No. 87-1207-CSX
Status: GRANTED

Title: Ray Will, Petitioner
v.
Michigan Department of State Police, et al.

Docketed:
January 11, 1988

Court: Supreme Court of Michigan

Counsel for petitioner: Burnham,William

Counsel for respondent: Caruso,Louis J.

Entry	Date	Note	Proceedings and Orders
1	Jan 11 1988	G	Petition for writ of certiorari filed.
2	Feb 8 1988		Waiver of right to respond filed.
3	Feb 10 1988		DISTRIBUTED. February 26, 1988
4	Feb 26 1988	F	Response requested -- JPS, BRW.
5	Mar 28 1988		Brief of respondents Michigan Dept. of State Police, et al. in opposition filed.
6	Mar 30 1988		REDISTRIBUTED. April 15, 1988
7	Apr 18 1988		Petition GRANTED.
			**********
9	May 5 1988		Order extending time to file brief of petitioner on the merits until June 18, 1988.
10	May 12 1988		Record filed.
		*	Certified copy of original record received.
11	Jun 17 1988		Joint appendix filed.
12	Jun 17 1988		Brief of petitioner Ray Will filed.
13	Jun 17 1988		Brief amici curiae of Lawyers' Comm. for Civil Rights Under Law, et al. filed.
15	Jun 24 1988		Order extending time to file brief of respondent on the merits until August 3, 1988.
16	Jul 20 1988	G	Application (A88-67) filed by Petitioner, for an extension of time within which to file a reply brief, submitted to The Chief Justice.
17	Jul 25 1988		Application (A88-67) granted by the Chief Justice extending the time to file until September 16, 1988.
18	Aug 3 1988		Brief amici curiae of National Governors' Association, et al. filed.
19	Aug 3 1988		Brief amici curiae of Tennessee, et al. filed.
20	Aug 3 1988		Brief of respondent filed.
22	Aug 18 1988		CIRCULATED.
23	Sep 15 1988	X	Reply brief of petitioner Ray Will filed.
24	Sep 30 1988		Set for argument. Monday, December 5, 1988. (3rd case) (1 hr.)
25	Dec 5 1988		ARGUED.

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FILED
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JOSEPH F. SPANIOL, JR.
CLERK

87-1207

No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE, AND DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

—o—

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QUESTION PRESENTED

Whether a state or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. § 1983?

PARTIES

The petitioner in this Court is Ray Will, who was the plaintiff in the proceedings below. Respondents are the Michigan Department of State Police and the Director of Michigan State Police. The Michigan Department of Civil Service and the State Personnel Director were originally defendants in the trial court and were dismissed from the suit by order of the trial court (see p. 12a of Appendix, *infra*), but continued to be carried on the caption of the case in the Michigan Court of Appeals and Michigan Supreme Court below.

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No. .....

In The
Supreme Court of the United States
October Term, 1987

RAY WILL,
Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
AND DIRECTOR OF MICHIGAN STATE POLICE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner Ray Will respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Michigan entered in this proceeding on August 7, 1987.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported *sub nom. Smith v. Department of Public Health, Will v. Department of Civil Service,* 428 Mich. 540, 410 N.W.2d 749 (1987), and is reprinted in the appendix hereto, p. 3a, *infra.*

The opinion of the Michigan Court of Appeals is reported *sub nom. Will v. Department of Civil Service,* 145 Mich. App. 214, 377 N.W.2d 826 (1985) and is reprinted in the appendix hereto, p. 124a, *infra.*

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JURISDICTION

The Michigan Supreme Court issued its opinion on August 7, 1987. A timely motion for rehearing was filed and denied on October 12, 1987. See 1a, *infra.* This petition is filed within 90 days of the order denying rehearing.

The jurisdiction of this Court to review the opinion and judgment of the Michigan Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

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STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case is the latest chapter in the story of the unconstitutional actions of the Michigan State Police "Red Squad", a special unit of police officers operating in Michigan since 1951 whose job it has been to monitor campus activists and others with "subversive" political ideas. The "Red Squad" was declared unconstitutional in 1976 by the Wayne County Circuit Court. Petitioner was never involved in political activity of the sort that would gain him the attention of the "Red Squad". He is a computer analyst who has been a loyal state employee since 1969. However, a "Red Squad" file was maintained on petitioner's student activist brother, Charles, and because of Charles' political persuasions, petitioner was not given a promotion in state government for which he was qualified.

In the latter half of 1973, petitioner sought opportunities to advance to data systems analyst 11, and one of these opportunities arose with the Michigan State Police. Though petitioner was ranked number two on the promotional register and the number one candidate withdraw, he did not get the position. The reason that petitioner did not get the promotion—which was unknown to him at the time—was that the State Police found that it had a "Red Squad" file on petitioner's student activist brother, Charles. Duly recorded in Charles' file was the notation: "Subject's brother Ray Eugene DOB 2-27-44 made application for employment with MSP. Personnel advised 8-9-73." Petitioner knew nothing of this, however, until 1977, when his brother Charles obtained his "Red Squad" file through a lawsuit and showed it to petitioner. 11a.

Upon learning that information regarding his brother's political activities was the cause of his being denied the position, petitioner filed lawsuits against the respondents in the Circuit Court of Ingham County (a court of general jurisdiction) and the Michigan Court of Claims (a court possessing jurisdiction over claims against the State of Michigan), claiming violations of his rights under the Michigan and federal constitutions and relying for the latter claims on 42 U.S.C. § 1983. The cases were consolidated for trial. 11a-13a.

In 1982, after a bench trial consisting of an agreed record and a damages hearing, Judge Thomas L. Brown rendered a decision on petitioner's § 1983 claim for both the Ingham County Circuit Court and the Michigan Court of Claims. He determined that the state of Michigan was the real party in interest and that the respondents Michigan Department of State Police and its director, sued in his official capacity, were "persons" within the meaning of § 1983. 14a. On the merits, the trial judge determined that "denial of [petitioner's] promotion based on [his] brother's political persuasion violates due process." 13a. Judge Brown awarded plaintiff $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages. 126a. The determination on the merits of petitioner's § 1983 claim that the respondents had violated his federal due process rights was not appealed to the Michigan Supreme Court and is not in contention here.

The Michigan Court of Appeals reversed the judgment. Relying on *Quern v. Jordan*, 440 U.S. 332 (1979), it concluded that the state is not a "person" within the

meaning of § 1983. 131a-132a. This determination conflicted with the decisions of two other panels of the Michigan Court of Appeals, which had held that the state and its agencies are "persons" under § 1983. See *Smith v. Michigan*, 122 Mich. App. 340, 333 N.W.2d 50 (1983) and *Karchefske v. Dept. of Mental Health*, 143 Mich App. 1, 371 N.W.2d 876 (1985). See also *Hampton v. Michigan*, 144 Mich. App. 794, 799-800, 377 N.W.2d 920 (1985) (state is not a "person"). Because of the conflict, the Michigan Supreme Court granted leave to appeal and consolidated the *Will* and *Smith* cases for argument.

The Michigan Supreme Court, by a 4-2 vote, held that the state and its officials are not "persons".[1] Justice Brickley's opinion on the "person" issue focussed in the main on this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *Quern v. Jordan*, 440 U.S. 332 (1979). In summary, respondents argued that *Monell* applied only to local governments and that *Quern* decided that the state is not a "person" for cause of action purposes, as well as determining that § 1983 does not abro-

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[1] A different 4-2 majority of the Michigan Supreme Court determined that there was an implied right of action for violation of the Michigan constitution and that such a remedy would not be barred by the state's sovereign immunity. See 9a. The positive ruling on the state constitutional claim issue was of no assistance to petitioner, however. Though he had originally set forth state constitutional claims in his complaint along with the § 1983 claims on which he prevailed in the trial court, the Michigan Supreme Court held that he had waived his right to assert his state constitutional claims by failing to preserve them for appeal. 98a. Consequently, the Michigan Supreme Court's negative determination on the § 1983 "person" issue removed all possibility of petitioner gaining reinstatement of the § 1983 judgment awarding him damages for the unconstitutional actions of the respondents.

grate states' Eleventh Amendment immunity. Petitioner argued that *Quern* did not decide the "person" issue and that the same reasoning that led this Court in *Monell* to conclude that local governments were "persons", should lead the Michigan court to conclude that states are "persons". The Michigan Supreme Court, in essence, agreed with petitioner's interpretation of the majority opinion in *Quern*, but concluded nonetheless that the holding there that § 1983 did not abrogate states' Eleventh Amendment immunity "was tantamount to deciding" that the state was not a "person." 36a-47a. This conclusion was based primarily on the Michigan Supreme Court's own analysis of the "historical circumstances surrounding the enactment of § 1983". 43a. The court reasoned that Congress could not have intended that states be "persons" because the only forum where they would be suable as such, in view of the Eleventh Amendment, would be in state court. See 42a-45a. In the court's view, since Congress "conferred jurisdiction over §1983 actions on the federal courts because the state judicial system had failed in the enforcement of federal constitutional rights", 43a, this meant that "the Forty-second Congress intended to provide a remedy in federal, not state court." 44a. Consequently, the court reasoned, Congress could not have intended to include states within the definition of suable "persons". 46a-47a.

Justices Archer and Levin dissented from the holding that the state is not a "person". Relying heavily on Justice Brennan's concurring opinion in *Quern*, they maintained that the facts that the Fourteenth Amendment's prohibitions were directed against the states and that the Dictionary Act defined "person" to include "bodies politic", show that a state is a "person". Cited in support

were several state and federal cases holding that states are "persons". See 117a-120a.

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REASONS FOR GRANTING THE WRIT

Summary of Reasons

Certiorari should be granted to review the decision of the Michigan Supreme Court because it involves an issue of the proper construction of § 1983 in an increasingly important context: where § 1983 actions are brought in state courts. In deciding that the state is not a proper party defendant in a § 1983 action because it is not a "person" within the meaning of that statute, the Michigan Supreme Court has decided that issue in a way that conflicts with decisions of the courts of last resort of the states of Colorado and Kansas and the First, Fifth and Tenth Circuit Courts of Appeal. In addition, the Michigan Supreme Court's decision on the "person" issue is based on a determination that Congress, in enacting § 1983, "intended to provide a remedy in federal, not state court." This determination is in conflict with this Court's reading of the legislative history of § 1983 and with the rules laid down by this Court for determining the circumstances under which state courts have jurisdiction over federal claims.

I. THE DECISION OF THE MICHIGAN SUPREME COURT INVOLVES AN ISSUE OF THE PROPER CONSTRUCTION OF AN IMPORTANT FEDERAL STATUTE THAT HAS CAUSED SERIOUS CONFUSION AMONG THE STATE AND LOWER FEDERAL COURTS

A. The Importance of the Issue

In § 1983 actions in *federal* court against a state where the state has *not waived* its Eleventh Amendment immunity, it could be argued that resolution of the "person" question has limited significance. Prospective injunctive relief against state officers in their offical capacities is allowed under the longstanding fiction of *Ex Parte Young*, 209 U.S. 123 (1908), thus making suability of the state by name, though technically a violation of the Eleventh Amendment, a matter of "no practical significance". *Alabama v. Pugh*, 438 U.S. 781, 783 (1978) (Stevens, J., dissenting). All other relief is barred by the Eleventh Amendment, see *Green v. Mansour*, 474 U.S. 64 (1985), thus rendering moot any issue of whether the state is an otherwise suable "person".

However, there are two situations where proper resolution of the "person" issue is essential: where the § 1983 action against the state is for money damages and it is brought (1) in a *state* court where the Eleventh Amendment is *inapplicable* or (2) in a *federal* court where the state has *waived* its Eleventh Amendment immunity. The case at bar and *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986), a recent Colorado Supreme Court decision with which it conflicts (see *infra* Part II), are examples of the first category; *Della Grotta v. Rhode Island*, 781 F.2d 343 (1st Cir. 1986), a federal Court of Appeals case with which the decision below conflicts (see *infra* Part III), is an example of the second. In these and similar cases, whether the state is a "person" will determine whether there will be any recovery at all.

Because states do not often waive their Eleventh Amendment immunity from suit in federal court, the greater number of § 1983 actions where the "person" issue will be crucial to the result will be cases like the present one—where the § 1983 action is brought in state court.[2] In this context, the issue takes on even greater importance.

First, there is good reason to believe that there has been and will continue to be an enormous increase in the number of § 1983 actions filed in state courts.[3] Where claims under a federal act can be handled in both federal and state court, this Court has granted certiorari "because the implications . . . were considered important to a correct and uniform application of the federal act in the state

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[2] Decisions on the "person" issue by federal courts even in injunctive cases are important to the extent that those decisions are relied upon by federal and state courts considering § 1983 claims for damages. In addition, though it is presently somewhat unusual for a state to waive its Eleventh Amendment immunity, the trend in general with regard to sovereign immunity is toward abolishing or limiting it. See *Prosser & Keeton on Torts* 1044-46 (5th ed. 1984).

[3] See Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 Miami L. Rev. 381, 434-35 & nn. 266 & 269 (1984). Just this term, this Court granted certiorari in one case raising special problems of § 1983 litigation in state court, see *Felder v. Casey*, 139 Wis.2d 614, 408 N.W.2d 19 (1987), *cert. granted* — U.S. —, 56 U.S. Law Week 3334 (November 10, 1987), and a petition is pending in another. See *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), *petition for cert. filed* 56 U.S. Law Week — (December —, 1987).

and federal courts." *Brown v. Western Railway of Alabama*, 338 U.S. 294, 295 (1949) (holding improper dismissal of FELA claim in state court for failure to comply with Georgia pleading rule). The issue of who can be a party defendant in a § 1983 action in state court is a basic issue of the scope of the cause of action that must be resolved for the guidance of the increasing number of state courts that are being presented with § 1983 suits against the most logical of all § 1983 defendants—states themselves. If state courts are to take their proper place as protectors of the federal rights of their citizens, the proper scope of § 1983 and the special aspects that relate to handling such claims in state court must be clarified. In this respect, the overcrowding of the federal courts with § 1983 actions makes facilitating a state court role in adjudicating such actions a matter of immense practical significance and some urgency.[4] In any event, the lack of a clear answer to fundamental questions about the scope of § 1983 claims results in considerable amounts of energy of the parties and judges being devoted to procedural wrangling even when, as in the present case, the merits of the federal constitutional claims made are not seriously contested.

Second, though some of the failure to read the term "person" in its normal sense to include states can be laid to genuine confusion, there is also a certain natural pressure on state courts that consider the "person" issue to

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[4] *See Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J, concurring in the result) citing statistics and discussion of the problem from Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1979).

decide that question in a way that does not give full expression to the federal interests underlying the Supremacy Clause. Similar problems were involved in *Felder v. Casey*, 139 Wis.2d 614, 408 N.W.2d 19 (1987), *cert. granted* — U.S. —, 56 U.S. Law Week 3334 (November 10, 1987), now pending before this Court. In *Felder*, in petitioner's view, the Wisconsin Supreme Court's requirement of dismissal of a § 1983 claim for failure to file a state-law mandated notice of claim is a decision that similarly does not pay sufficient heed to the requirements of the Supremacy Clause as it relates to the proper handling of § 1983 claims in state courts. Even more serious problems of this sort pervade *Hill v. Dept. of Corrections*, 513 So.2d 129 (Fla. 1987), *petition for cert. filed* 56 U.S. Law Week — (December —, 1987), in which the Florida Supreme Court flatly held that state-law sovereign immunity operated as a bar to a § 1983 action for damages in Florida courts. *Compare* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189, 235-68 (1981).

B. The Nature of the Confusion About the "Person" Issue

This Court originally held in *Monroe v. Pape*, 365 U.S. 167 (1961), that cities were not suable "persons" within the meaning of § 1983, despite the fact that the Dictionary Act, passed two months before §1983, defined the term to include "bodies politic and corporate". *Id.* at 187, 191.[5]

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[5] The Dictionary Act, provided standard definitions for terms used "in all acts [of Congress] hereafter passed . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

In *Monell*, however, the Court overruled this part of *Monroe* and held that a municipalities, school boards and other local entities are "persons" against whom a claim can be made under § 1983. *Id.* at 690. In so deciding, this Court concluded that it had misread the legislative history and that the definition of the term "person" in the Dictionary Act to include "bodies politic and corporate", of course, included cities. *Id.* at 665-690. See also *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.29 (1979) (bi-state regional planning commission formed pursuant to an interstate compact is covered by the *Monell* definition of "person").

Monell was limited to the issue of whether *local* governmental entities were "persons". However, if that term includes all "bodies politic", then it should certainly include states. The problem is that, where states are involved, the decision on the "person" issue—a cause of action question—has been confused with the Eleventh Amendment immunity question. The two issues are related in one sense. Congress may abrogate a state's Eleventh Amendment immunity by statute if it provides an "unequivocal expression of Congressional intent to" do so. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Since clear "expression" of an "intent" to abrogate may sometimes be communicated by establishing a cause of action, see, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), how the cause of action is defined can be good evidence of an intent to abrogate. It is the underlying intent, however, that is crucial. For example, in *Hutto v. Finney*, 437 U.S. 678 (1978), the requisite intent to abrogate was established through unequivocal statements in

the *legislative history* of 42 U.S.C. § 1988 even though the statute did not "itself . . . expressly abrogate the States' immunity". See *id.* at 698-99 n.31.[6] In several other Eleventh Amendment cases, this Court has recognized that Congress has authorized a cause of action against a class of defendants that includes states and yet has found insufficient intent to abrogate Eleventh Amendment immunity. In those cases, this Court has explicitly separated the cause of action and immunity issues, observing that such a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital*, 473 U.S. at 246.[7]

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[6] The aftermath of *Atascadero State Hospital* provides another example of Congress abrogating through means other than redefinition of a cause of action. Shortly after this Court's decision, Congress "overruled" it by passing an amendment to the statute that made no changes in the cause of action section and instead simply stated that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of" the Act. See P.L. 99-506 § 1003(a)(1) (October 21, 1986).

[7] In *Atascadero State Hospital*, Congress had authorized suit against "any recipient of federal assistance" and "[t]here [was] no claim that the state of California is not a recipient of federal assistance under the statute." *Id.* at 245-46 (emphasis by the Court). In Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279 (1973), Congress clearly authorized a claim for violations of the Fair Labor Standards Act against states, though the Court held that such provision of a cause of action did not operate to abrogate the states' Eleventh Amendment immunity. *Id.* at 285. Just last term, in *Welch v. State Dept. of Highways and Public Transportation*, — U.S. —, 107 S.Ct. 2941 (1987), this Court recognized that Congress had authorized suit for damages in federal court against an employer by "[a]ny seaman"—including those employed by the State of Texas—and yet held that this was insufficient to abrogate Texas' Eleventh Amendment immunity from suit in federal court. 107 S.Ct. at 2947.

Certain members of this Court believed that *Monell*, when combined with *Fitzpatrick v. Bitzer, supra*, and *Hutto v. Finney, supra*, meant both that states were "persons" under § 1983 and that that fact was a sufficient indication of Congressional intent to abrogate their Eleventh Amendment immunity. See *Hutto v. Finney*, 437 U.S. at 700-704 (Brennan, J., concurring). However, this theory was rejected by a majority of the Court in *Quern v. Jordan*, 440 U.S. 332 (1979), for failure to satisfy the clear congressional intent requirement. In the words of the Court, the legislative history of § 1983 failed to disclose any more than "slender 'evidence' that Congress *intended* by the general language of §1983 to override the traditional sovereign immunity of the States." *Id.* at 341 (emphasis supplied). Carefully skirting the question of whether states were "persons" suable under § 1983 in the absence of Eleventh Amendment immunity, this Court further observed that § 1983 does not "explicitly and by clear language indicate on its face *an intent* to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and *which shows that Congress considered and firmly decided to abrogate* the Eleventh Amendment immunity of the States." *Id.* at 345 (emphasis supplied).

Consideration of the above led the Michigan Supreme Court below to conclude:

> *Quern* remains an ambiguous decision. . . . Obviously, *Quern* has definitely answered the Eleventh Amendment question as to the intention of Congress in adopting § 1983, but it has left without a definite answer the question whether it intended the term "person" to include states for purposes of § 1983 actions in state courts in which the Eleventh Amendment would not apply. . . . The Court's ambiguous decision in *Quern*, coupled with its less than consistent decisions on Eleventh Amendment immunity, has left the commentators and the lower federal courts speculating whether *Quern* did, in fact, resolve the "person" issue. 36a-37a.

For the courts already committed to the issue one way or the other and for the courts that will face the issue in the future, *Quern* will not get any clearer with age. As long as there is confusion and opinions conflict sharply, the development of § 1983 actions in state court will be retarded by the continuing struggle over the basic procedural question of whether there is a cause of action against the state.

II. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF COLORADO AND KANSAS AND THE INTERMEDIATE APPELLATE COURTS OF INDIANA AND NEW MEXICO.

In *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986), a faculty member sued the university and certain of its employees for damages both under state tort law and § 1983. The Colorado Supreme Court held that, "[e]ven though *Monell* did not specifically address the question . . . , its reasoning logically requires us to conclude that a state university is a 'person' within the meaning of § 1983." *Id.* at 900. Consequently, if the individual university employees' "actions were pursuant to official university policy and caused a constitutional tort, Uberoi

could recover on his § 1983 claim against the officers and against the university." *Id.* at 903.[8]

The Kansas Supreme Court, in *Gumbhir v. Kansas State Bd. of Pharmacy*, 231 Kan. 507, 646 P.2d 1078 (1982), a suit by a pharmacist arising out of denial of a license, considered the question of whether the state's Board of Pharmacy was a "person" suable in that state's courts under § 1983. 646 P.2d at 1083. Noting first that "*Monell* softened the old notion that a state agency was not a person within the meaning of § 1983", *id.*, the Kansas court then considered the impact of *Quern*. After separating the cause of action and Eleventh Amendment issues and canvassing the cases on both sides of the "person" question, it observed:

> Most of the cases denying suit against the state or its agencies under § 1983 have done so under the 11th Amendment, which prohibits suits against states in federal court absent consent. The 11th Amendment is not applicable to this case since the action was brought in state court. Further, a careful reading of *Quern* reveals that case did not hold states or state agencies could never be considered "persons" under § 1983. In fact, Justice Rehnquist's majority opinion carefully skirted the issue. We conclude under the facts of this case that the Kansas State Board of Pharmacy is a "person" as contemplated by § 1983.

646 P.2d at 1084.

[8] There can be no doubt that the University of Colorado is an arm or agency of the state. In determining the university's status under the state Governmental Immunity Act, the Supreme Court cited a statute defining the circumstances under which "[a] claim against the state" could be "settled for or on behalf of the state by the attorney-general, with the concurrence of the head of the affected . . . *university* . . .". *Id.* at 898 (emphasis in original). Cf. *Edelman v. Jordan*, 415 U.S. 651 (1974) (test of whether suit is a suit against a state within the purview of the 11th Amendment is whether relief will have a fiscal impact on the state treasury).

The Michigan Supreme Court decision below also conflicts with decisions of the intermediate appellate courts of Indiana and New Mexico. *Cf. Cuyler v. Adams*, 449 U.S. 433, 435-36 (1981) (certiorari is appropriate to resolve a conflict between federal and state intermediate appellate courts at least as to matters of general federal law). In *Stanton v. Godfrey*, 415 N.E.2d 103 (Ind. App. 1981), a § 1983 welfare class action, the Indiana Court of Appeals decided that the Indiana "Department of Public Welfare is a person under § 1983 and is a proper defendant." *Id.* at 107. It did so on authority of *Monell*. In *Rehmah Navajo School Board v. Bureau of Revenue*, 720 P.2d 1243, 1251 (N.M. App. 1986), the New Mexico Court of Appeals, relying on the Kansas Supreme Court decision in *Gumbhir v. Kansas State Board of Pharmacy*, *supra*, held the state tax bureau "is considered a 'person' within the meaning of Section 1983" to the extent that the state has waived its immunity from suit.

State supreme courts that have determined that the state or its agencies are not "persons" under § 1983 include those of Washington, *Hontz v. State*, 105 Wash.2d 302, 714 P.2d 1176, 1180 (1986), citing *Edgar v. State*, 92 Wash.2d 217, 595 P.2d 534, 537-38 (1979), *cert. denied*, 444 U.S. 1077 (1980); Idaho, *Merritt for Merritt v. State*, 198 Idaho 20, 696 P.2d 871, 877 (1985); Alaska, *Wickwire v. State*, 725 P.2d 695, 704 n.9 (Alaska 1986), citing *State v. Green*, 633 P.2d 1381, 1382 (Alaska 1979), but see *Brown v. Wood*, 592 P.2d 1250, 1251 (Alaska 1979) (state university

is a § 1983 "person"); and Wisconsin, *Boldt v. State*, 101 Wis.2d 566, 305 N.W.2d 133, 143-44 (1981), *cert. denied* 454 U.S. 973 (1982). State intermediate appellate decisions to the same effect include *Gay v. State*, 730 S.W.2d 154, 157-58 (Tex. App. 1987); *St. Mary's Hospital and Health Center v. State*, 721 P.2d 666, 669 (Ariz. App. 1986); *Mezey v. State*, 161 Cal.App.3d 1060, 208 Cal.Rptr. 40, 43 (1984); and *Shaw v. City of St. Louis*, 664 S.W.2d 572, 576 (Mo. App. 1983), *cert. denied*, 469 U.S. 849 (1984).

III. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, FIFTH AND TENTH CIRCUITS.

In *Della Grotta v. State of Rhode Island*, 781 F.2d 343 (1st Cir. 1986), the plaintiff sued under § 1983 and recovered judgments against the state and a state park police officer for damages for an illegal arrest and search. The occasion for the First Circuit holding that the state of Rhode Island was a suable § 1983 "person" was the fact that the state had waived its immunity from suit in federal court under the Eleventh Amendment. See 781 F.2d at 345-47.[9] In approaching the "person" issue, the First Circuit indicated that there are two separate questions (1) whether suit is barred by the Eleventh Amendment and (2) whether the state is a suable "person", and that

[9] The federal district court for Rhode Island, in a different case, had certified the question to the Rhode Island Supreme Court, which held that the state's waiver of immunity statute "'manifests . . . a legislative intent' to waive the State's eleventh amendment immunity to suit in federal court." 781 F.2d at 346 quoting from *Laird v. Chrysler Corp.*, 460 A.2d 425, 427 (R.I. 1983).

Quern v. Jordan decided only the first. 781 F.2d at 348, n.6. The First Circuit relied heavily on the district court's reading of *Quern* in *Marrapese v. Rhode Island*, 500 F.Supp. 1207 (D.R.I. 1980), *rev'd on other grds.* 749 F.2d 934 (1st Cir. 1984):

> Justice Rehnquist's opinion, while emphatic in reasserting the Court's belief that Congress had not intended to abrogate the states' immunity through § 1983, . . . conspicuously avoided any statement that the term "person" did not include "state". Stated precisely, *Quern* concluded only that the Congress which enacted § 1983 did not intend to *force* the states to answer in the federal court for their constitutional violations. Of itself, this holding does not mandate the further conclusion that the 42nd Congress did not intend to *allow* the state to answer in federal court for constitutional violations *if* they consented to do so.

500 F.Supp. at 1211 (emphasis by the court). With the troubling implications of *Quern* thus disposed of, the First Circuit noted that, though *Monell* was limited to municipalities, it saw "nothing in *Monell* to suggest that, apart from eleventh amendment considerations, a state should be viewed differently from other bodies politic." 781 F.2d at 349. Thus, the Court of Appeals saw "no principled reason to distinguish between states and municipalities as 'persons' suable under section 1983." *Id.*

In *Gay Student Services v. Texas A&M University*, 612 F.2d 160 (5th Cir. 1980), *cert. denied* 449 U.S. 1034 (1980), an organization of homosexual students sued the state university and its officers in their official capacities for injunctive relief and damages under § 1983 for failing to grant official student organization status to the group.

The Fifth Circuit separated the question of Eleventh Amendment immunity from the cause of action question and observed that "[a]n entity may be a 'person' under § 1983 yet still not be sued for monetary relief based on the entity's close connection with the State and its treasury". *Id.* at 163 n.3. Otherwise, the word "person" would "have a bifurcated application dependent on the nature of the relief sought." *Id.* (citing *Kenosha v. Bruno*, 412 U.S. 507, 513 (1973). Then it held that the state university was a "person" on authority of *Monell*. *Id.* at 163-64.[10] *Gay Student Services* was relied on by the First Circuit in *Della Grotta*. See 781 F.2d at 349 n.7.

In *Brogan v. Wiggins School District*, 588 F.2d 409, 411 (10th Cir. 1978), the Tenth Circuit intimated that injunctive and damages claims under § 1983 were generally proper even though "addressed only to the [Colorado] State Board of Education." Unlike the First and Fifth Circuit decisions above, it is admittedly not completely clear whether the Tenth Circuit's decision in *Brogan* on its face holds that the state board is a "person" suable under § 1983 for damages and injunctive relief. What *is* clear, however, is that *Brogan* is *understood* that way. The federal district court in Colorado, in *Morrow v. Sadler*, 502 F.Supp. 1200 (D.Colo. 1980), relied on *Brogan* to approve § 1983 claims for injunctive and damages relief against the Colorado State Historical Society, which the

[10] While leaving the issue to be determined by the district court in the first instance, the Fifth Circuit noted the virtually unanimous (and probably correct) view of the Courts of Appeal that a state university is an arm of the state and thus, absent consent, is immune under the Eleventh Amendment. See id. at 165 n.5 (citing cases).

court found to be "a state educational institution, and a state agency". *Id.* at 1205.[11] Finding *Monell* of no direct assistance because it applied only to local governments and not state agencies, the district court found that "*Brogan* is authority for the proposition that a state agency can be a 'person' under Section 1983." 502 F.Supp. at 1205, citing 588 F.2d at 411. Consequently, the court held that "[u]nder *Brogan* the Society is a 'person' for purposes of Section 1983." 502 F.Supp. at 1205.

The above decisions of the First, Fifth and Tenth Circuits are in direct conflict with the post-*Monell* decisions of the Eighth Circuit in *Harris v. Missouri Court of Appeals*, 787 F.2d 427, 429 (8th Cir. 1986), *cert. denied* 107 S.Ct. 179 (1986) (in action for monetary and injunctive relief, Missouri Court of Appeals is not a person), and the Seventh Circuit in *Toledo, Peoria R.R. v. Illinois*, 744 F.2d 1296, 1298 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1751 (1985) (in just compensation claim suit under § 1983, state is not a "person").[12] *Cf.* Sup. Ct. R. 17.1(a) (1st sentence) (certiorari appropriate when there is conflict between federal courts of appeal). Some peculiarities about the Fifth Circuit's position on the issue should be men-

[11] Similar to *Della Grotta* v. *State of Rhode Island, supra*, the occasion for having to decide the "person" issue was the inapplicability of the Eleventh Amendment: in the Society's case, its inapplicability to that part of its budget that did not represent state funding. *Id.* at 1203-04, citing *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment bars actions for damages to be paid from the state treasury).

[12] *Pre-Monell* holdings that a state is not a person are omitted here because they are invariably based on the now-overruled decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961). See Michigan Supreme Court opinion below, 41a-42a (collecting cases).

tioned. The holding and reasoning of *Gay Student Services, supra,* that a state university is a "person" is constantly relied on by courts in the "person" camp, including *Della Grotta.* Yet the Fifth Circuit took the opposite position in *Ruiz v. Estelle,* 679 F.2d 1115, 1137 n.75 (5th Cir.), *aff'd* in part 688 F.2d 266 (5th Cir. 1982) *cert. denied,* 460 U.S. 1042 (1983), citing *Gay Student Services* for a different proposition and not recognizing its contrary determination of the "person" issue.[13]

The conflicts between the decision below and the state and federal cases holding the state is a "person" are not likely to resolve themselves. First, as the above discussions of the cases indicate, the conflicts between the "person"

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[13] District court holdings on the issue include the following. Holding the state *is* a "person" are: *Meeker v. Addison,* 586 F.Supp. 216, 225-26 (S.D. Fla. 1983); *Rhode Island ACLU v. Rhode Island Lottery Comm.,* 553 F.Supp. 752, 766-67 (D.R.I. 1982); *Harris v. Arizona Bd. of Regents,* 528 F.Supp. 987, 991-92 (D. Ariz. 1981); *Marrapese v. Rhode Island,* 500 F.Supp. 1209, 1210,12 (D.R.I. 1980); *Johnson v. San Jacinto Jr. College,* 498 F. Supp. 555, 567 (S.D. Tex. 1980); *Zentgraf v. Texas A&M University,* 492 F.Supp. 265, 271 (S.D. Tex. 1980); *Aumiller v. University of Delaware,* 434 F.Supp. 1273, 1306 (D. Del. 1977) (mixed in with 11th Amendment issue); *Hodges v. Tomberline,* 510 F. Supp. 1280, 1283 (S.D. Ga. 1980) (mixed in with 11th Amendment issue); *Morrow v. Sudler,* 502 F.Supp. 1200, 1204-05 (D. Colo. 1980); *Irwin v. Calhoun,* 522 F.Supp. 576, 583-85 (D. Mass. 1981); *Weisbord v. Michigan State University,* 495 F.Supp. 1347, 1354 (W.D. Mich. 1980); *Atchison v. Nelson,* 460 F. Supp. 1102, 1106-07 (D. Wyo. 1978). Cases holding that the state is *not* a "person" are: *Holladay v. State of Montana,* 506 F.Supp. 1317 (D.Mont. 1981); *Vermett v. Hough,* 606 F.Supp. 732, 743 (W.D. Mich. 1984); *Emswiler v. McCoy,* 622 F.Supp. 786, 788 (S.D.W.Va. 1985); *Kompara v. Bd. of Regents of the State University,* 548 F.Supp. 537, 540-42 (M.D. Tenn. 1982); *Brown v. State of Nevada,* 476 F.Supp. 86, 89 (D.Nev. 1979); *Thompson v. New York,* 487 F.Supp. 212, 226 (N.D.N.Y. 1979).

and "non-person" camps involve conflicts in reasoning as well as result. The cases on both sides of the issue cite and rely upon the same opposing sets of arguments and precedents. Second, though the number of jurisdictions in the "non-person" camp is somewhat greater, the reasoning in those cases is usually limited to little more than perfunctory citation of *Quern.* The cases in the "person" camp, though less numerous, tend toward more complete analysis and thus are likely to hold their own against greater numbers. Short of a definitive pronouncement from this Court, the same arguments and precedents outlined here will continue to divide the state appellate courts and the federal courts of appeal.

IV. THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH THIS COURT'S VIEW OF THE LEGISLATIVE HISTORY OF § 1983 AND WITH WELL-ESTABLISHED RULES REGARDING STATE COURT JURISDICTION OVER FEDERAL CLAIMS

Since the Michigan Supreme Court concluded that "*Quern* remains an ambiguous decision", 36a, the crucial element in its reasoning that the state is not a "person" was provided by its own analysis of the "historical circumstances surrounding the enactment of § 1983." 43a. It is petitioner's position that this analysis directly conflicts both with this Court's view of § 1983's legislative history and with the normal rules relating to concurrent jurisdiction of state courts over federal claims.

The Michigan Supreme Court's analysis had two parts.

First, the court erroneously reasoned that the 42nd Congress intended that § 1983 actions be brought only in federal court where the Eleventh Amendment would have prevented making the state a defendant. From this erroneous assumption, the court concluded that the 42nd Congress must have excluded states from the term "person". 42a-45a. In the Michigan Supreme Court's view, it would "ignore the historical motivation behind enactment of § 1983" for one "to argue that aggrieved plaintiffs could seek relief in state courts" under § 1983. 43a. Since Congress enacted § 1983 "because the state judicial system had failed in the enforcement of federal constitutional rights" (43a), "the Forty-second Congress intended to provide a remedy in federal, not state courts." 44a.

All this is directly contrary to this Court's recognition that "many legislators interpreted [§ 1983] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy v. Board of Regents*, 457 U.S. 496, 506 (1982). In *Patsy*, this Court specifically relied upon the comments of Senator Thurman:

> I do not say that this section gives to the Federal Courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court. . . .

Cong. Globe, 42nd Cong., 1st Sess., app. 216 (1871), quoted 457 U.S. at 507. See also *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (in enacting § 1983, "Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts.")

That this would be the 42nd Congress' understanding is supported by the fact that "[s]tate and federal courts have exercised concurrent jurisdiction [over federal law claims] since 1789." *Note*, "State Enforcement of Federally Created Rights", 73 Harv. L. Rev. 1551 (1960). It was well-established from the time of the original constitution "that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited." *The Federalist No. 82* (A. Hamilton). Thus, the implications of "not expressly prohibit[ing]" jurisdiction to the state courts would have been clear to § 1983's framers: the federal claim would be fully enforceable in state court. See *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) and Redish and Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 313-314 (1976).[14]

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[14] Thus, another problem with the Michigan Supreme Court's conclusion is that it proves too much. A finding that Congress intended that a federal claim it has established be litigated "in federal, not state courts" compels the conclusion that federal jurisdiction exists *exclusively* in the federal courts. If the Michigan Supreme Court's reasoning were true, *no* § 1983 action of *any* kind could be brought in state court, whether against an officer or an entity or for injunctive relief or damages. The Michigan Supreme Court's reasoning thus conflicts with this Court's holding that state courts at least have concurrent jurisdiction over § 1983 actions. See *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283-85 (1980). *Cf. Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248, 252 (1969) (holding that Tennessee state courts have no jurisdiction over § 1983 claims since "it would be illogical indeed to hold that a State Court should enforce, or is required to enforce, an alleged cause of action which owes its very existence to congressional recognition of reluctance or refusal of State Courts to act".), *overruled by Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986).

The second half of the Michigan Supreme Court's reasoning from "historical circumstances" was that it found it "unlikely" that Congress would "at the same time preclud[e] private individuals from bringing actions under the statute against states in federal court but permit[] such actions against states in state court." 44a-45a, quoting *Hampton v. Michigan*, 144 Mich. App. 794, 797-800, 377 N.W.2d 920 (1985). Aside from the fact that it is the *Eleventh Amendment*, not Congress, that "preclud[es]" suits against states in federal court, the fallacy of this argument is that it assumes that the standard for abrogating a state's Eleventh Amendment immunity and the standard for authorization of federal claims to be brought in state court are the same. As discussed earlier in Part IB of this petition, in order to abrogate states' Eleventh Amendment immunity from suit in *federal* court, it must be shown that Congress specifically intended to abrogate it. See *Quern v. Jordan*, 440 U.S. at 345; *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242. By contrast, all that is necessary to authorize a federal claim to be brought in state court is the simple authorization of the claim coupled with a failure to "expressly prohibit[]" jurisdiction in the state courts. *The Federalist No. 82, supra.* Even if there might be some basis, in the face of the Eleventh Amendment, to read the term "person" in a narrow sense so as not to authorize a cause of action against the state, no such special rule should apply absent Eleventh Amendment concerns. Consequently, the term "person" should be given the normal meaning assigned to it by the Dictionary Act—a definition that includes "bodies politic and corporate".

Justice Brickley's opinion for the Michigan Supreme Court—as incorrect as it is in its reading of the intentions

of the 42nd Congress and the implications of those intentions—is the most exhaustive treatment of the "person" issue by a state supreme court. As a result, it is likely to have a great influence on other state courts that will be confronting the issue, thus perpetuating the misunderstanding about the law of federal claims in state court as it relates to § 1983. This is especially likely since the conflict among the courts that have considered the issue is so sharp. Consequently, the Court should grant a writ of certiorari in order to reverse the Michigan Supreme Court's decision and make clear that "person" in § 1983 includes states and their officials when suit is filed in state court.

CONCLUSION

For all the reasons stated, a writ of certiorari should be issued to review the judgment and opinion of the Michigan Supreme Court below.

January 6, 1987

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APPENDIX

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 12th day of October in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable

DOROTHY COMSTOCK RILEY,
Chief Justice
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

Rehearing No. 195

RAY EUGENE WILL,

Plaintiff-Appellee
Cross-Appellant,

v

DEPARTMENT OF
CIVIL SERVICE, et al,

Defendants,

SC 76838
CoA 74840
LC 78-21187 AA
Ct of Claims 6667

and

DEPARTMENT OF
STATE POLICE, et al,

Defendants-Appellants
Cross-Appellees.

In this cause, a motion for rehearing is considered and, in order of the Court, it is hereby DENIED.

Griffin, J., not participating.

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that is a true transcript therefrom, and the whole of said original order.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 12th day of October in the year of our Lord one thousand nine hundred and eighty-seven.

/s/ Jacqueline B. MacKinnon,
Deputy Clerk.

SMITH v DEPARTMENT OF PUBLIC HEALTH
WILL v DEPARTMENT OF CIVIL SERVICE

Docket Nos. 71016, 76838. Argued March 6, 1986 (Calendar Nos. 15-16). Decided August 7, 1987.

Jack Smith brought an action in the Court of Claims against the State of Michigan, Department of Public Health, and others, alleging false imprisonment as a result of his 1926 commitment to a state institution for the mentally retarded; negligent, reckless, and intentional breach of the duty to care for, treat, and educate him; violations of his due process and equal protection rights under the Michigan Constitution; and violation of his federal constitutional rights, for which he sought damages under 42 USC 1983. The court, Michael G. Harrison, J., granted summary judgment for the defendants as to the false imprisonment and negligent care counts on the ground of governmental immunity, but denied the defendants' motion to dismiss the claims under the Michigan Constitution and 42 USC 1983. The Court of Appeals, D.E. Holbrook, Jr., P.J., and T.M. Burns, J., reinstated the plaintiff's claim of false imprisonment and affirmed the dismissal of the negligence count on the ground of governmental immunity. The Court of Appeals also affirmed the denials of dismissal of the Michigan constitutional and § 1983 claims, concluding that for the purpose of § 1983, the state is a person (Docket No. 56501). The defendants appeal.

Ray E. Will brought an action in the Ingham Circuit Court against the Department of Civil Service and others, alleging that the refusal by the Civil Service

Commission to hear his grievance that information regarding his brother's political activities may have influenced a decision by the Department of State Police to not promote him violated his due process rights under the United States and Michigan Constitutions. He alleged claims for damages under 42 USC 1983 and the Michigan Constitution. The case was remanded to the commission for a hearing. Prior to the hearing, the plaintiff brought an action against the same defendants involving similar allegations in the Court of Claims. The court, James T. Kallman, J., consolidated the cases and granted accelerated judgment for the defendants on the Michigan constitutional claim because of the pending administrative hearing, but denied summary judgment for the defendants with regard to the § 1983 claim. Thereafter, the commission found that the state had violated Const 1963, art 11, § 5 and Civil Service Rule 1.2 in making the promotion decision. Subsequently the court, Thomas L. Brown, J., held that the commission's decision provided sufficient grounds for finding that the defendants had violated plaintiff's federal civil rights under § 1983, that the State of Michigan was the real party in interest, and that the Department of State Police and its director, sued in his official capacity, were persons for purposes of suit under § 1983. The court additionally held that the state had consented to be sued in the Court of Claims by virtue of the Court of Claims Act, but that it could not be sued in the circuit court. Ultimately, the court awarded the plaintiff money damages against the Department of State Police and its director. The Court of Appeals, Danhof, C.J., and Shuster, J. (Gribbs, J., concurring), vacated the judgment against the Department of State Police, concluding that the state was not a person for purposes of a § 1983 suit. However, the Court of Appeals remanded the case for a determination of the potential liability of the Director of State Police, given the possibility of immunity from suit for § 1983 actions (Docket No. 74840). The defendants appeal, and the plaintiff cross-appeals.

In a memorandum opinion, signed by the six participating Justices, the Supreme Court *held:*

Neither the state nor a state official sued in an official capacity is a person for purposes of a damage suit under 42 USC 1983. In *Smith*, the allegation of false imprisonment did not avoid governmental immunity. There is no "intentional tort" exception to governmental immunity. Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action. A claim for damages arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases. In *Will*, the plaintiff failed to preserve for appeal any claim for damages for violations of the Michigan Constitution.

In *Smith*, the Court reversed those portions of the Court of Appeals judgment that reinstated the plaintiff's false imprisonment claim and affirmed the denial of summary judgment on the plaintiff's § 1983 claim. The defendants were entitled to summary judgment as to both claims. The Court affirmed the Court

of Appeals affirmance of the denial of summary judgment as to the plaintiff's Michigan constitutional claims, and directed the Court of Claims, on remand, to determine whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged, whether such a violation occurred, and, if it occurred, whether it is one for which a damage remedy is proper.

In *Will*, the Court reversed that portion of the Court of Appeals judgment that remanded this case to the Court of Claims for further proceedings regarding the liability of the Director of State Police, and remanded to the Court of Claims for entry of judgment in favor of the defendant Director of State Police. In all other respects, the Court affirmed the judgment of the Court of Appeals.

Justice BRICKLEY, joined by Chief Justice RILEY, stated that neither the State of Michigan nor its officials, sued in their official capacities, are persons for purposes of a damage suit under 42 USC 1983. There is no "intentional tort" exception to governmental immunity, and the allegation of false imprisonment in *Smith* does not avoid governmental immunity. There is no implicit right to sue the state for damages on the basis of violations of art 2, §§ 1 and 16 of the 1908 Michigan Constitution. In *Will*, the plaintiff failed to preserve for appeal any claim for damages for violations of the Michigan Constitution.

Justice BOYLE, joined by Justice CAVANAGH, concurring in part and dissenting in part, stated that in *Smith* an allegation of a constitutional tort resulting from a state custom or policy avoids governmental immunity. Governmental immunity does not bar a suit in a state court alleging violation by the state of a right protected by the Michigan Constitution. Recovery of damages for such a violation may be recognized in appropriate cases. Because the record in *Smith* is inadequate for determining whether a violation of the Michigan Constitution occurred by virtue of a governmental custom or policy and, if such a violation occurred, whether it is one for which a damage remedy is proper, the case should be remanded for further proceedings.

Justice LEVIN concurred in the result in *Smith* as stated in part v of Justice BOYLE's opinion but, as stated in Justice ARCHER's opinion, would not limit the remand to a determination whether the alleged constitutional violation occurred by "virtue of a governmental custom or policy" or whether "a damage remedy is proper."

Justice ARCHER, joined by Justice LEVIN, dissenting, stated that the state is a person for purposes of a suit within the meaning of 42 USC 1983. Viewed in the light of its legislative history and remedial purposes, § 1983 is the appropriate mechanism for securing fundamental federal constitutional rights allegedly violated by a state. The common-law doctrine of sovereign immunity is inapplicable in suits against a state for alleged infringement of such fundamental rights. Neither sovereign immunity nor statutory immunity should bar relief where the state allegedly has violated the constitutional rights of its citizens. An allegation of an intentional tort is not barred by the governmental immunity statute because such an ac-

tivity does not constitute a governmental function. Thus, the decision in *Will* should be reversed, and the decision in *Smith*, affirmed.

Although Justice ARCHER would not limit the inquiry on remand in *Smith* to the questions posed by Justice BOYLE, he, nonetheless, joined in the remand for the purpose of determining whether a violation of the Michigan Constitution occurred by virtue of a governmental custom or policy and, if such a violation occurred, whether it is one for which a damage remedy is proper.

Justice GRIFFIN took no part in the decision of these cases.

Affirmed in part, reversed in part, and remanded.

122 Mich App 340; 333 NW2d 50 (1983) affirmed in part and reversed in part.

145 Mich App 214; 377 NW2d 826 (1985) affirmed in part and reversed in part.

John A. Braden for plaintiff Smith.

Lick, Emery, DeVine & Mallory, P.C. (by *Lawrence J. Emery*), for plaintiff Will.

Frank J. Kelley, Attorney General, *Louis J. Caruso*, Solicitor General, and *George L. McCargar* and *Thomas R. Wheeker*, Assistant Attorneys General, for defendants in *Smith*.

Frank J. Kelley, Attorney General, *Louis J. Caruso*, Solicitor General, and *George H. Weller*, Assistant Attorney General, for defendants in *Will*.

Amicus Curie:

William Burnham for the American Civil Liberties Union Fund of Michigan.

MEMORANDUM OPINION. These consolidated cases require us to decide the following questions: (1) whether the state is a "person" for purposes of a damage suit under 42 USC 1983; (2) whether a state official, sued in an official capacity, is a "person" for purposes of a damage suit under 42 USC 1983; (3) whether there is an "intentional tort" exception to governmental immunity; and (4) whether a plaintiff may sue the state for damages for violations of the Michigan Constitution.

A majority of the Justices are of the opinion that:

1) The state is not a "person" for purposes of a damage suit under § 1983.

2) A state official, when sued in an official capacity, is not a "person" for purposes of a damage suit under § 1983.

3) The allegation of false imprisonment in *Smith* does not avoid governmental immunity.

4) There is no "intentional tort" exception to governmental immunity.

5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.

6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

7) In *Will*, the plaintiff failed to preserve for appeal any claim for damages for violations of the Michigan Constitution.

In *Smith*, we reverse those portions of the Court of Appeals judgment that reinstated the plaintiff's false imprisonment claim and affirmed the denial of summary judgment on the plaintiff's § 1983 claim. The defendants were entitled to summary judgment as to both claims. We affirm the Court of

Appeals affirmance of the denial of summary judgment as to the plaintiff's Michigan constitutional claims, and direct the Court of Claims, on remand, to determine whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged; whether such a violation occurred; and, if it occurred, whether it is one for which a damage remedy is proper.

In *Will*, we reverse that portion of the Court of Appeals judgment that remanded this case to the Court of Claims for further proceedings regarding the liability of the Director of State Police, and we remand to the Court of Claims for entry of judgment in favor of the defendant Director of State Police. In all other respects, we affirm the judgment of the Court of Appeals.

This memorandum opinion is signed by the six participating Justices. There are separate concurring and dissenting opinions. However, at least four Justices concur in every holding, statement and disposition of this memorandum opinion.

RILEY, C.J., and LEVIN, BRICKLEY, CAVANAGH, BOYLE, and ARCHER, JJ., concurred.

BRICKLEY, J. These cases require that we decide whether the state and its officials, sued in their official capacities, are "persons" in a suit for damages under 42 USC 1983, whether an intentional tort is an exception to governmental immunity, and whether there is an implicit right to sue the state for damages for violations of the Michigan Constitution. We would find that the state and its officials, sued in their official capacities, are not persons under 42 USC 1983, that there is no intentional-tort exception under the governmental immunity act, and that there is no implicit right to sue the state for damages on the basis of violations of art 2, §§ 1 and 16 of the 1908 Michigan Constitution.

I. FACTS

A. WILL v DEP'T OF CIVIL SERVICE

The plaintiff had been in the employ of the State of Michigan since 1969 when the following facts occurred, as set forth by the Court of Appeals:

> In the latter half of 1973, plaintiff sought opportunities to advance to data systems analyst 11, and one of these opportunities arose with the state police. Although plaintiff was ranked number two on the promotional register and the number one candidate withdrew, plaintiff was not hired by the state police that summer. He subsequently obtained a data systems analyst 11 position with the Highway Department in November, 1973.
>
> Unbeknownst to plaintiff, when the defendant department ran a security check on plaintiff, information about plaintiff's student activist brother, Charles, was released. Charles' file contained the notation, "Subject's brother Ray Eugene DOB 2-27-44 made application for employment with MSP. Personnel advised 8-9-73." Plaintiff did not learn of this until 1977, when legislation providing for maintenance of the so-called "red squad" files, 1950 (Ex Sess) PA 38, 39 and 40, was declared unconstitutional and Charles obtained his file and showed it to his brother, plaintiff. [*Will v Dep't of Civil Service*, 145 Mich App 214, 217-218; 377 NW2d 826 (1985).]

Upon learning that information regarding his brother's political activities may have influenced the decision to not promote him, Will, in 1977, filed a grievance with the Civil Service Commission. It was denied as untimely. In January, 1978, in a three-count complaint, he commenced suit

against various state defendants[1] in the Ingham Circuit Court. Count I alleged that the CSC's refusal to hear plaintiff's grievance denied him due process of law in violation of the United States and Michigan Constitutions; count II alleged various violations of the United States and Michigan Constitutions as grounds for asserting a claim pursuant to 42 USC 1983; and count III alleged that defendants' determination of plaintiff's qualification for promotion, on the basis of his brother's political activities rather than on merit, "denied Plaintiff's right to due process of law and rights created under Const 1963, Art XI, Section 5," entitling him to damages. The state defendants did not answer plaintiff's complaint, but instead moved to remand the case to the CSC for a grievance hearing. In June of 1978, the motion was granted. The court retained jurisdiction to review any appeal from the decision of the CSC.

In November, 1978, while awaiting action on his grievance before the CSC, plaintiff filed suit in the Michigan Court of Claims. His complaint consisted of two counts, essentially identical to counts II (§ 1983 claim) and III (Michigan constitutional claim) of his circuit court complaint. In response, state defendants on December 5, 1978, moved for summary judgment on count I (§ 1983 claim) and accelerated judgment on count II (Michigan constitutional claim) of plaintiff's Court of Claims complaint. On May 7, 1979, the Court of Claims granted the state defendants' motion for accelerated judgment on count II because of the pending administrative proceedings, but denied defendants' motion for summary judgment on plaintiff's § 1983

[1] Mr. Will sued the Department of Civil Service, the State Personnel Director, the Department of State Police, and the Director of State Police. The first two defendants were dismissed by order of the Court of Claims on January 3, 1983.

claim "[b]ecause there [was] a question of fact." The Court of Claims also granted plaintiff's motion to consolidate the Court of Claims and circuit court cases.

In the meantime, a fourth-step grievance hearing was conducted on plaintiff's charges. In June of 1980, the Civil Service Commission hearing officer found that the state had violated both Const 1963, art 11, § 5 (the civil service provision) and Civil Service Rule 1.2 in making its decision regarding Mr. Will's promotion on the basis of "partisan considerations." The CSC affirmed the decision in January of 1981. Neither the state defendants nor the plaintiff appealed the CSC decision in the circuit court.

Nearly two years later, in November of 1982, Judge Thomas L. Brown rendered a decision on plaintiff's § 1983 claim for both the Ingham Circuit Court and the Court of Claims. First, he decided that the CSC's decision provided sufficient grounds for finding that defendants had violated plaintiff's *federal* civil rights, under § 1983.

> The violation of state law by a state official of itself is insufficient to state a violation of a federal right. . . . Under [§ 1983], liability is imposed on any "person" who deprives another person's federally protected rights. Such rights have been construed by the courts to include the protection of life, liberty and property under the Fourteenth Amendment of the Federal Constitution. It is Plaintiff's position that the Due Process Clause protects his property right as a public employee to fair treatment.
>
> Plaintiff argues that the State having established a system of merit, [under Const 1963, art 11, § 5] the denial of plaintiff's promotion based on Plaintiff's brother's political persuasion violates due process. The Court agrees.

Second, Judge Brown determined that the real party in interest was the State of Michigan, and that the Michigan Department of State Police and its director, sued in his official capacity, were persons for purposes of suit under § 1983. The civil service defendants were dismissed. Finally, after considerable discussion of federal constitutional immunity under the Eleventh Amendment, the circuit court held that the state had consented to be sued in the Court of Claims by virtue of the Court of Claims Act, MCL 600.6401 *et seq.*; MSA 27A.6401 *et seq.*, but could not be sued in the circuit court.

Seeking to have the court's decision include a finding that defendants' actions also violated the state constitution, on March 17, 1983, plaintiff unsuccessfully moved to clarify the court's November, 1982, decision to include state constitutional grounds as a basis for its decision. On October 25, 1983, the court, on the basis of its November, 1982, opinion, awarded plaintiff money damages against the State Police and its director. The remaining State Police defendants then appealed the Court of Claims judgments in the Court of Appeals.[2]

In July, 1985, the Court of Appeals entered a decision only addressing the plaintiff's § 1983 claims. The Court disallowed suit against the state, concluding that § 1983 did not include states as

[2] Plaintiff then cross-claimed an appeal of the Court of Claims final judgment, specifically on the question of the court's denial of plaintiff's motion to clarify. In response, defendants filed a motion to affirm the Court of Claims refusal to "clarify" its November 15, 1982, decision. The Court of Appeals resolved the clarification issue by order of May 25, 1984.

> IT IS ORDERED that the motion to affirm be, and the same is hereby GRANTED for the reason that the question sought to be reviewed is so unsubstantial as to need no argument or formal submission and is without merit.

persons. As for the plaintiff's claims against the Director of State Police, the Court remanded the case for a determination of his potential liability, given the possibility of immunity from suit for § 1983 actions.

The state defendants then applied to this Court for leave to appeal the Court of Appeals judgment dealing with the issue of the State Police director's potential liability. Plaintiff cross-appealed, and, on September 25, 1985, this Court granted leave to appeal to resolve, inter alia, a Court of Appeals conflict on the question whether the state is a person for purposes of suit under § 1983.

B. SMITH v STATE OF MICHIGAN

On February 4, 1925, the Probate Court for Mecosta County committed Minnie Smith to the state mental hospital at Traverse City. She was admitted on February 10 and two days later gave birth to her son, Jack, the plaintiff. Ms. Smith died following that birth. In June of 1925, Jack Smith was transferred to the State Public School in Coldwater, a state orphanage, pursuant to a May 15, 1925, commitment order issued by the Grand Traverse County Probate Court. The superintendent of the state school believed Jack Smith to be feeble-minded and sought to transfer him and two other infants to the Michigan Home and Training School (MHTS) in Lapeer, an institution for the retarded. In November of 1926, Jack was transferred to the MHTS pursuant to an order issued by the Director of the Welfare Department, who supervised both the Michigan Home and the State Public School. No court order was entered authorizing Jack Smith's commitment to the Michigan Home in Lapeer.

In October of 1937, the Grand Traverse County Probate Court officially committed Jack Smith to

the Michigan Home and Training School, where he had resided for the previous eleven years. The Michigan Home in Lapeer remained Jack Smith's home until 1964. In June of that year, Mr. Smith was transferred, allegedly pursuant to court order, to the Traverse City State Hospital, the place of his birth. He was released from the state hospital nine years later in May of 1973, and lived in foster care homes until his death in February of 1984.

In February, 1979, Mr. Smith filed suit in the Michigan Court of Claims. His complaint contained four counts.

> Count I alleged false imprisonment due to his improper commitment to MHTS; Count II alleged negligent, reckless, intentional breaches of defendants' duty to care for, treat, and educate plaintiff; Count III alleged that his due process and equal protection rights under the Michigan Constitution had been violated; Count IV sought damages under 42 USC 1983 for violation of his federal constitutional rights. [*Smith v Michigan*, 122 Mich App 340, 342; 333 NW2d 50 (1983).]

In response, state defendants moved for summary or accelerated judgment. In a January, 1981, opinion, the Court of Claims determined, first, that plaintiff suffered from a continuing mental infirmity, thus tolling the applicable statute of limitations and making his action timely.[3] Second, the court granted defendants' motion for summary judgment as to count I (false imprisonment) and count II (negligent care), holding that the state enjoyed immunity from suit on both counts. Third, the court denied defendants' motion to dismiss count III (Michigan constitutional claims). Finally, as to count IV, the court disagreed with defen-

[3] The state did not appeal the statute of limitations issue in the Court of Appeals, nor did it raise it before this Court.

dants' contention that § 1983 did not include states as persons and so denied defendants' motion to dismiss. Therefore, of plaintiff's original four counts, only two remained: the § 1983 and the Michigan constitutional claims.

Plaintiff then sought leave to appeal in the Court of Appeals. Defendants sought leave to cross-appeal. In June of 1981, the Court of Appeals granted leave. Approximately a year and a half later, the Court issued its opinion, ruling on all four of plaintiff's original claims in the Court of Claims.

On plaintiff's first count, the Court of Appeals reinstated plaintiff's claim of false imprisonment. As to count II, the Court agreed with the Court of Claims dismissal, stating that governmental immunity shielded state defendants from liability for negligence. The Court of Claims judgment on counts III and IV was affirmed. As to plaintiff's Michigan constitutional claim for damages (count III), the Court basically reiterated the Court of Claims finding that governmental immunity did not apply to constitutional claims. Finally, as to count IV (the § 1983 claim), the Court concluded that for the purpose of § 1983, the state was indeed a person.

> One of the main purposes behind § 1983 was to enforce the provisions of the Fourteenth Amendment. Although many disagree about the Fourteenth Amendment's effect and purpose, all agree that it was passed to ensure the constitutionality of the Civil Rights Act of 1866. The Civil Rights Act of 1866 was designed to eliminate the black codes. As such, we conclude that Congress must have intended that states be included as "persons." [*Smith, supra* at 352.]

In response to the Court of Appeals decision,

state defendants sought leave to appeal in this Court the false imprisonment, § 1983, and state constitutional claims. The plaintiff cross-appealed the dismissal of his negligent-care claim. In September of 1984, this Court granted defendants leave to appeal in order to resolve the conflict in the Court of Appeals whether the state is a person under § 1983, but denied plaintiff leave to cross-appeal.

II. IS THE STATE A PERSON?

The central issue presented to this Court in both *Smith* and *Will* is whether an individual may sue the state for damages pursuant to § 1983 or, more specifically, whether the word "person," in § 1983, includes states. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [42 USC 1983.]

A brief history of § 1983 is beneficial as background for an analysis of that statutory section.

On March 23, 1871, President Ulysses S. Grant delivered a message to Congress requesting its immediate attention to legislation aimed at curbing the lawlessness then rampant in the Southern

states. In a brief message to Congress, President Grant stated:

> A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. [Cong Globe, 42nd Cong, 1st Sess 244 (1871).]

Congress moved quickly on the President's request. In April of that same year, it passed the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Although the act generated much controversy and debate, § 1, now codified at 42 USC 1983,

> [c]aused the least concern, as it only added civil remedies to the criminal penalties established by the 1866 Civil Rights Act. [Note, *Developments in the law: Section 1983 and federalism*, 90 Harv L R 1133, 1155 (1977).]

In fact, § 1 of the act created no new substantive rights. Enacted to enforce the provisions of the Fourteenth Amendment, it merely "provid[ed] a remedy for the violation of rights created elsewhere." *Day v Wayne Co Bd of Auditors*, 749 F2d 1199, 1202 (CA 6, 1984). See, also, *Chapman v Houston Welfare Rights Organization*, 441 US 600, 616-618; 99 S Ct 1905; 60 L Ed 2d 508 (1979).

As originally enacted, § 1 of the act conferred jurisdiction on federal district and circuit courts to hear claims such as may be brought pursuant to

§ 1983.[4] Congress recognized the failure of the state courts to adequately protect federal rights and so specifically created a right to sue in federal court for violation of those rights.

> To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary. At the time this Act was adopted, it must be remembered, there existed no general federal-question jurisdiction in the lower federal courts. Rather, "Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws" . . . . With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials. [*District of Columbia v Carter*, 409 US 418, 427-428; 93 S Ct 602; 34 L Ed 2d 613 (1973), reh den 410 US 959 (1973).]

[4] Section 1983 originally read as follows:

> Be it enacted . . . That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts*, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases. [Civil Rights Act of 1871, 17 Stat 13 (1871). Emphasis added.]

28 USC 1343(3) now embodies the jurisdictional grant of § 1 of the Ku Klux Klan Act of 1871. A party may also bring a § 1983 claim under the general federal jurisdiction statute, 28 USC 1331. For a discussion of the jurisdictional issues related to § 1983, see Zagrans, *"Under color of" what law: A reconstructed model of section 1983 liability*, 71 Va L R 499, 500, n 1 (1985).

Therefore, faced with the unwillingness or inability of state courts to vindicate federally guaranteed rights, Congress enacted § 1983 and created a federal avenue of relief.

Although the cases before us occur in state court, the Eleventh Amendment of the United States Constitution, which bars suit by a citizen against a state in a federal court, is the backdrop to the development and, to some extent, the confusion in the case law on the meaning of "person" in § 1983. This Eleventh Amendment issue arises when a § 1983 action is brought in federal, rather than state court; however, as will be seen, the United States Supreme Court eventually merged the question of the effect of Eleventh Amendment immunity on suit against a state in a federal court with the question whether the term "person" includes a state in a § 1983 action.

The Eleventh Amendment is the product of a controversy created by an early United States Supreme Court decision, *Chisholm v Georgia*, 2 US (2 Dall) 419; 1 L Ed 440 (1793). *Chisholm* involved a suit brought by a citizen of South Carolina against the State of Georgia to collect a debt incurred by the state during the Revolutionary War. The Supreme Court interpreted the clause in US Const, art III, § 2, extending the judicial power of the United States "to Controversies . . . between a State and Citizens of another state . . ." to allow a private citizen to sue another state before the United States Supreme Court. This decision created such contro-

versy that the Eleventh Amendment was proposed and ratified by 1798. The language of the amendment had the technical effect only of reversing the holding of the *Chisholm* decision by barring those suits brought by citizens of one state against another state.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [US Const, Am XI.]

But in *Hans v Louisiana*, 134 US 1; 10 S Ct 504; 33 L Ed 842 (1890), the Court gave an expansive interpretation to the amendment. *Hans* involved a suit by a citizen of Louisiana against his own state. The Court applied the Eleventh Amendment, holding that its prohibition extended to suits against one's own state as well as against other states.[5]

The United States Supreme Court began its struggle with the issue of a state's immunity in federal court in several cases dealing with federal statutes other than § 1983. See *Parden v Terminal R*, 377 US 184; 84 S Ct 1207; 12 L Ed 2d 233 (1964), reh den 377 US 1010 (1964), and *Employees v Missouri Dep't of Public Health & Welfare*, 411

[5] In *Ex parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908), the Supreme Court carved out an exception to the Eleventh Amendment's prohibition against suing a state in federal court. *Young* involved a suit brought in a federal court by railroad stockholders seeking to enjoin the Attorney General of Minnesota from enforcing what they considered to be an unconstitutional state statute. The Court found that the lower federal court could enjoin enforcement of the allegedly unconstitutional act, despite objections that such a suit was, in effect, one against the state itself. By "stripping away" the official or representative character of the state attorney general, the Court created the legal fiction that the railroad stockholders actually sought relief against Mr. Young, not against the state.

US 279; 93 S Ct 1614; 36 L Ed 2d 251 (1973). In *Parden*, a suit in federal court under the Federal Employers' Liability Act against Alabama's state-owned railroad, the Court gave a somewhat confusing analysis of the question of Congress' power to subject states to suit. The Court held that Congress could subject a state to suit, despite its claim of Eleventh Amendment immunity, because the states, in ratifying the constitution, had surrendered a portion of their sovereignty to the national government. But the Court also required the state's consent before allowing imposition of suit. The Court concluded that Alabama had consented to suit when it began operation of its railroad some twenty years after passage of the FELA.[6]

In *Employees*, a fair labor standards case in federal court, the United States Supreme Court held that, even though the statute literally included the state as an employer, Congress did not

[6] Professor Field claims that two different conceptions of the Eleventh Amendment underlie the conflicting "power" rationales in *Parden v Terminal R, supra*.

> The Court's implications that Congress is free to impose suit upon the states as long as it stays within its article I and other regulatory powers suggest that sovereign immunity is only a common law doctrine. If sovereign immunity had constitutional status, how could Congress abrogate it?
>
> • • •
>
> [But] the Court sometimes talks in language of consent . . . . [T]he consent on the part of a state that the Court looks to is not a consent accompanying ratification of the Constitution. Indeed, it hardly could be since the primary source of sovereign immunity, according to the Court, is the eleventh amendment—a post-ratification amendment. . . . [Here] the Court appears to view sovereign immunity as a constitutionally required doctrine [abrogated only by state consent]. [Field, *The Eleventh Amendment and other sovereign immunity doctrines: Congressional imposition of suit upon the states*, 126 U Pa L R 1203, 1212-1213 (1978). See, generally, Field, *The Eleventh Amendment and other sovereign immunity doctrines: Part one*, 126 U Pa L R 515 (1978).]

by "clear language" intend to lift the Eleventh Amendment immunity in its adoption of that act. Although Congress possessed the power to abrogate the states' Eleventh Amendment immunity, absent evidence indicating Congress' intent to do so, the Court would not allow suit to proceed against a state in federal court.

Unlike *Parden* and *Employees*, the Court's opinion in *Edelman v Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974), reh den 416 US 1000 (1974), on remand *Jordan v Trainor*, 405 F Supp 802 (ND Ill, 1975), rev'd 551 F2d 152 (CA 7, 1977), on reh 563 F2d 873 (CA 7, 1977), aff'd *Quern v Jordan*, 440 US 332; 99 S Ct 1139; 59 L Ed 2d 358 (1979), incorporated both Eleventh Amendment and § 1983 issues. *Edelman* involved a suit in federal court pursuant to the Social Security Act and § 1983 against Illinois state officials responsible for administering one of the Social Security Act's categorical assistance programs, the federal-state program of Aid to the Aged, Blind or Disabled (AABD). The Court reversed that part of the Seventh Circuit Court of Appeals decision ordering the payment of retroactive benefits by Illinois state officials, holding that such an award, requiring the payment of funds from the state treasury, constituted an action against the state itself and was barred by the Eleventh Amendment.

Moreover, the Court would not allow the state's participation in the AABD program to suffice as evidence of the state's consent to suit in federal court. The Court concluded that it would find a waiver of immunity

> only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." [*Id.* at 673. Citation omitted.]

The Court then concluded that Congress did not abrogate the states' Eleventh Amendment immunity in passing § 1983 and, consequently, that the Eleventh Amendment barred retroactive relief against the state, pursuant to § 1983, in federal court.

> [I]t has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex parte Young*, [209 US 123; 28 S Ct 441; 52 L Ed 714 (1908)], and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co v Dep't of Treasury*, [323 US 459; 65 S Ct 347; 89 L Ed 389 (1945)]. [*Edelman, supra* at 675-677.]

Fitzpatrick v Bitzer, 427 US 445; 96 S Ct 2666; 49 L Ed 2d 614 (1976), added yet another aspect to the analysis of Eleventh Amendment doctrine—the relationship between Congress' enforcement power pursuant to § 5 of the Fourteenth Amendment and the concept of state sovereignty embodied in the Eleventh Amendment. *Fitzpatrick* involved suit in federal court against the State of Connecticut by a class of male employees alleging sex discrimination pursuant to title VII of the 1964 Civil Rights Act. Petitioner employees sought both prospective injunctive relief and a retroactive monetary award. The Court held that the Eleventh Amendment did not bar the collection in federal court of retroactive benefits to petitioners

when Congress acted to enforce the "substantive guarantees of the Fourteenth Amendment."

The Court recognized that a special relationship existed between Congress' enforcement powers pursuant to § 5 of the Fourteenth Amendment and a state's sovereignty embodied in the earlier-adopted Eleventh Amendment, and the Court concluded that the enabling provisions of § 5 of the Fourteenth Amendment limited the scope of the Eleventh Amendment.

> But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v Jordan*, 415 US 651 (1974); *Ford Motor Co v Dep't of Treasury*, 323 US 459 (1945). [*Fitzpatrick, supra* at 456.]

Therefore, without ever explicitly addressing the state's consent to suit, the Court allowed retroactive relief against the state on the basis of congressional abrogation of the state's Eleventh Amendment immunity. See also *Atascadero State Hosp v*

Scanlon, 473 US 234, 237-238; 105 S Ct 3142; 87 L Ed 2d 171 (1985).

Then in *Monell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the Court held that the term "person" in § 1983 included local governmental units, thus overruling the Court's earlier decision to the contrary in *Monroe v Pape*, 365 US 167; 81 S Ct 473; 5 L Ed 2d 492 (1961). *Monell* involved a suit in federal court against the City of New York by a class of female employees aggrieved by their employer's official pregnancy policy. The employees brought suit pursuant to § 1983, seeking both injunctive relief and back pay for periods of forced leave.

The Court's analysis basically consisted of a reexamination of the congressional debates surrounding the passage of the Civil Rights Act of 1871. The Court rejected the *Monroe* Court's conclusion that congressional failure to adopt the first conference revision of the Sherman amendment[7] indicated congressional intent to exclude municipalities from the scope of the term "person" in § 1983. The *Monell* Court concluded:

[7] Much of the Court's discussion in *Monell* revolved around the Sherman amendment. As originally proposed, the amendment imposed liability on the "inhabitants of the county, city, or parish" for damage inflicted by "persons riotously and tumultuously assembled together." See *id.* at 702. After conference, the committee reported a new version of the Sherman amendment, which imposed liability directly on the "county, city, or parish" for damage caused by persons "riotously and tumultuously assembled together." See *id.* at 703-704. It was the Court's interpretation of congressional reaction to this conference substitute that motivated both its holding in *Monroe* and *Monell*. The Senate approved the first conference substitute of the Sherman amendment, but the House rejected it. The second conference substitute dropped the idea of imposing liability on municipalities. Instead it imposed liability on any person who, with knowledge of a conspiracy to violate civil rights, took no action to prevent such a conspiracy. See *id.* at 668-669, 704. Congress adopted this second conference version of the Sherman amendment, now codified at 42 USC 1986.

> [T]he constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based . . .—would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. [*Monell, supra* at 669.]

The Court reached this conclusion by determining that Congress objected to the Sherman amendment because it created new obligations for municipalities, *not* because it imposed civil liability for the violation of obligations already imposed. Unlike the imposition of financial liability on municipalities, creation of new obligations by the federal government interfered with the state's power to govern itself.

> [M]unicipalities as instrumentalities through which States executed their policies could be equally disabled from carrying out state policies if they were also obligated to carry out federally imposed duties. . . . Thus, there was ample support for [the] view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States." [*Id.* at 678-679.]

Moreover, imposition of liability on municipalities did not interfere with the notion of state sovereignty because the federal government, in protecting federal constitutional rights in this manner, did not need to engage the states in any "positive" action.

After concluding that congressional failure to adopt the first conference version of the Sherman amendment did not mean that Congress meant to shield municipalities from financial liability, the

Court turned to the question whether the term "person" in § 1983 included municipalities. The Court noted the remedial nature of the Civil Rights Act of 1871.

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed." [*Monell, supra* at 684.]

The Court viewed such snippets from the legislative history as indicative of Congress' intent to give the term "person" in § 1983 a broad interpretation. Consequently, the Court saw no reason not to extend the Dictionary Act's definition of person to the statutory language of § 1 of the Ku Klux Klan Act. Congress had passed the Dictionary Act a few months prior to enacting the Ku Klux Klan Act. The Dictionary Act stated that

> "the word 'person' may extend and be applied to bodies politic and corporate . . . ." [*Id.* at 688.]

Since the phrase "bodies politic and corporate" applied to municipal corporations in 1871, and since the legislative history indicated Congress desired a liberal construction of § 1 of the Ku Klux Klan Act, the Court concluded that the term "person" in § 1983 included municipalities. The Court, however, expressly limited its holding to local government units "not considered part of the State for Eleventh Amendment purposes." *Monell, supra* at 690, n 54.

Hutto v Finney, 437 US 678; 98 S Ct 2565; 57 L Ed 2d 522 (1978), reh den 439 US 1122 (1979), raised two further issues of interest to the development of Eleventh Amendment doctrine and § 1983

case law. First, the Court seemed to soften the strict standard for congressional abrogation of the Eleventh Amendment enunciated in its earlier decision in *Edelman*. Second, Justice Brennan, in concurrence, raised, but did not answer, the question whether the Court's earlier decision in *Fitzpatrick* and *Monell* left states open to suit for damages pursuant to § 1983.

Hutto involved a challenge to conditions in the Arkansas penal system. The federal district court found that conditions in the state prisons constituted cruel and unusual punishment and entered a number of corrective remedial orders. The Commissioner of Corrections and the Arkansas Board of Corrections, challenged an award of attorney fees payable from Department of Correction funds. The commissioner and board argued that a federal court could not, consistent with the Eleventh Amendment, award attorney fees payable from state funds. The Supreme Court, however, found the Eleventh Amendment no bar to an award of fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC 1988.

Reiterating the reasoning of its *Fitzpatrick* decision, the Court held that Congress has "plenary power" to lift the states' Eleventh Amendment immunity when acting to enforce the provisions of the Fourteenth Amendment. In enacting § 1988 Congress exercised that power and abrogated the states' immunity.

The Court then examined whether Congress intended to subject states to the fee award provisions of § 1988. Although the "express language" of the act did not authorize awards against the states, the legislative history specifically addressed the question of awarding attorney fees against state governments. This failure to satisfy what Justice Powell labeled a "clear statement" rule, however, did not prevent the Court from awarding fees to the prevailing party.

> The Attorney General argue[d] that the statute itself must expressly abrogate the States' immunity from retroactive liability. . . . Even if we were not dealing with an item such as costs, this reliance would be misplaced. . . .
>
> The present Act . . . ha[d] a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune from fee awards. . . . [Moreover], the claims asserted in *Employees* . . . and in *Edelman v Jordan* . . . were based on [a statute rooted in Congress' art I power]. In this case, as in *Fitzpatrick v Bitzer*, . . . the claim is based on a statute enacted to enforce the Fourteenth Amendment . . . . Applying the standard appropriate in a case brought to enforce the Fourteenth Amendment, we have no doubt that the Act is clear enough to authorize the award of attorney's fees payable by the State. [*Hutto, supra* at 698-699, n 31.]

Perhaps of greater interest, however, was the discussion between Justice Brennan, in his concurrence, and Justice Powell, in his partial concurrence and partial dissent, of the effect of the Court's decisions in *Fitzpatrick* and *Monell* on the states' liability for damages pursuant to § 1983. Justice Powell argued that the Eleventh Amendment barred any award of attorney fees against a state absent "an express statutory waiver" of immunity in the Civil Rights Attorney's Fees Awards Act.

Justice Brennan took issue with Justice Powell's claim that § 1988 did not authorize fee awards against the states. Although concurring in the Court's opinion, Justice Brennan issued a separate

opinion to address arguments put forth by Justice Powell.

> "Mr. Justice Powell takes the view . . . that unless 42 USC § 1983 also authorizes damages awards against the States, the requirements of the Eleventh Amendment are not met. Citing *Edelman v Jordan*, 415 US 651 (1974), he concludes that § 1983 does not authorize damages awards against the State and, accordingly, that § 1988 does not either. There are a number of difficulties with this syllogism, but the most striking is its reliance on *Edelman v Jordan* . . . . [*Hutto, supra* at 700.]

Justice Brennan questioned the continued vitality of *Edelman*'s conclusion that § 1983 did not abrogate the states' Eleventh Amendment immunity, expressing the view that the issue whether § 1983 included states as persons was "an open question."

Justice Brennan, as well as numerous state and lower federal court judges, claimed the Court finally answered this question in *Quern v Jordan, supra*. *Quern* was actually a sequel to the Court's earlier decision in *Edelman*. *Quern* involved the question whether the Eleventh Amendment precluded a federal court from ordering state officials to mail explanatory notices to plaintiff class members advising them of procedures available to secure a determination of their entitlement to past welfare benefits. The Supreme Court held that it did not, viewing the notice as ancillary to prospective relief already ordered by the lower federal court.

The Court never explicitly addressed the question whether the term "person" in § 1983 included states. But, in his concurring opinion, Justice Brennan argued that the majority had

> reach[ed] out to decide an issue unnecessary to its holding . . . conclud[ing], in what [was] patently dicta, that a State [was] not a "person" for purposes of 42 USC § 1983 . . . . [*Quern, supra* at 350 (Brennan, J., concurring).]

Unfortunately, the ambiguity of the Court's decision only further complicated the already confused body of case law dealing with § 1983 claims against the state to the extent that all parties in this suit attempt to bend it to their point of view.

The majority in *Quern* focused on the issue of congressional intent to abrogate the Eleventh Amendment. The Court began its analysis by reaffirming its holding in *Edelman*, the continued vitality of which Justice Brennan questioned in his concurrence in both *Hutto* and *Quern*. In doing so, the Court adopted the reasoning of Justice Powell in his concurring opinion in *Hutto* to refute Justice Brennan's claim that the Court's opinion in *Fitzpatrick* and *Monell* undermined the premise of its opinion in *Edelman*, that § 1983 did not abrogate the historic immunity of the states from suit in federal court.

> Mr. Justice Brennan's opinion concurring in the judgment states that "*Edelman v Jordan* . . . had held that § 1983 did not override state immunity, for the reason, as the Court later stated in *Fitzpatrick*, that '[t]he Civil Rights Act of 1871 . . . had been held in *Monroe v Pape* . . . to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant.'" . . . Since *Monell* overruled *Monroe*'s holding that cities and other municipal corporations are not "persons" within the meaning of § 1983, Mr. Justice Brennan's opinion argues that the "premise" of *Edelman* has been "undercut." . . . The fallacy of this line of reasoning was aptly demonstrated last Term by Mr.

> Justice Powell in his concurring opinion in *Hutto*, where he stated: "The language in question from *Fitzpatrick* was not essential to the Court's holding in that case. Moreover, this position ignores the fact that *Edelman* rests squarely on the Eleventh Amendment immunity, without adverting in terms to the treatment of the legislative history in *Monroe v Pape* . . . ." . . . In fact *Monroe v Pape* is not even cited in *Edelman*. [*Quern, supra* at 339, n 7.]

Therefore, finding nothing in Eleventh Amendment case law subsequent to *Edelman* that undermined either its holding or reasoning, the Court rejected Justice Brennan's contentions that *Edelman* was, in essence, no longer good law.

The Court in *Quern* went on to address Justice Brennan's concerns about the validity of the *Edelman* holding that § 1983 did not abrogate the historic immunity of the states from suit in federal court. Justice Brennan argued that the history of the Fourteenth Amendment, which worked a great transformation on the nation's federalist system, the Dictionary Act's reference to "bodies politic" in its definition of "person," and the language and legislative history of § 1983 supported his argument that the term "person" in § 1983 encompassed states. The Court acknowledged these arguments, but framed its response in terms of the states' Eleventh Amendment immunity.

> [U]nlike our Brother Brennan, we simply are unwilling to believe, on the basis of such slender "evidence," that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States.
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> • • •
>
> [N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States. In *Tenney v Brandhove*, 341 US 367 [71 S Ct 783; 95 L Ed 1019] (1951), the Court rejected a similar attempt to interpret the word "person" in § 1983 as a withdrawal of the historic immunity of state legislators. . . .
>
> [G]iven the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1. [*Quern, supra* at 341-343.]

Moreover, the Court reiterated the fact that it consistently required a clearer manifestation of congressional intent to abrogate the states' historic immunity than demonstrated by Justice Brennan. While equivocating on the question whether Congress had to *expressly* abrogate the states' Eleventh Amendment immunity,[8] the Court concluded

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> [8] But we need not reach the question whether an express waiver [was] required because neither the language of the statute nor the legislative history disclose[d] an intent to overturn the States' Eleventh Amendment immunity by imposing liability directly upon them. [*Quern v Jordan, supra* at 344-345, n 16.]

In *Quern*, the Court, therefore, avoided the question what standard to apply in determining congressional abrogation of the states' Eleventh Amendment immunity.

But in *Atascadero State Hosp v Scanlon*, 473 US 234, 242; 105 S Ct 3142; 87 L Ed 2d 171 (1985), the Court noted that

that neither the language nor the legislative history of § 1983 indicated an intent on the part of Congress to lift the states' historic immunity from suit in federal court.

> [Section] 1983 [did] not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor [did] it have a history which focuse[d] directly on the question of state liability and which show[ed] that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. Nor [did] our reaffirmance of *Edelman* render § 1983 meaningless insofar as states [were] concerned. See *Ex parte Young*, 209 US 123 (1908). [*Quern, supra* at 345.]

Therefore, absent any evidence indicating congressional intent to lift the states' immunity, the Court in *Quern* reaffirmed its holding in *Edelman* that § 1983 did not abrogate the states' Eleventh Amendment immunity.

Quern remains an ambiguous decision. Justice Brennan's analysis appeared to merge the issues of "person" and immunity, arguing that

> [i]f a State were a "person" for purposes of § 1983 . . . its immunity under the Eleventh Amendment would be abrogated by the statute. [*Quern, supra* at 350-351.]

The majority, on the other hand, found the evi-

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Speaking for the majority, Justice Powell indicated throughout *Atascadero* that the Court's "new" standard required express statutory language indicating Congress' intent to abrogate the states' Eleventh Amendment immunity. See Brown, *State sovereignty under the Burger Court—How the Eleventh Amendment survived the death of the Tenth: Some broader implications of* Atascadero State Hospital v Scanlon, 74 Geo L J 363, 379-388 (1985).

dence offered by Justice Brennan to support a conclusion that § 1983 encompassed states as persons too slender to warrant a conclusion that Congress intended to abrogate the states' Eleventh Amendment immunity. So while the majority spoke in terms of abrogation of immunity, Justice Brennan claimed the Court actually decided the issue whether the state was a person for purposes of suit pursuant to § 1983.

Obviously, *Quern* has definitively answered the Eleventh Amendment question as to the intention of Congress in adopting § 1983, but it left without a definite answer the question whether it intended the term "person" to include states for purposes of § 1983 actions in state courts in which the Eleventh Amendment would not apply.[9] Thus, *Quern* further complicated the

> unfortunate marriage of section 1983 doctrine [and] eleventh amendment doctrine . . . . [Eisenberg, *Section 1983: Doctrinal foundations and an empirical study*, 67 Cornell L R 482, 518 (1982).]

The Court's ambiguous decision in *Quern*, coupled with its less than consistent decisions on Eleventh Amendment immunity, has left the commentators and the state and lower federal courts speculating whether *Quern* did, in fact, resolve the "person" issue. In fact, a number of commentators equivocate on the question, noting the different interpretations accorded *Quern*.

In *Quern v Jordan* the Court subsequently may

[9] In 1981, Senator Mathias introduced a bill to the 97th Congress, proposing amendment of 42 USC 1983. Section 2(b) of that proposed legislation defined "person" to include "any State or territory." For an analysis of Senator Mathias' bill and similar attempts to amend § 1983, see Sagafi-Nejad, *Proposed amendments to section 1983 introduced in the Senate*, 27 St Louis U L J 373 (1983).

have held generally that states are not suable persons under 1983. However, because *Quern* involved a *federal court* action, it is also possible to read *Quern* as an Eleventh Amendment case. [Nahmod, Civil Rights and Civil Liberties Litigation (2d ed), § 6.20, p 388.]

Some commentators even argue that *Quern* determined that states were persons for purposes of § 1983.

> In *Quern v Jordan*, the Court reaffirmed the *Edelman* rule, although it was not clear whether the Court was holding that states are not *persons* for section 1983 purposes, or that states are *persons* but that they can raise the Eleventh Amendment as a bar to suit in federal court. [Mahoney, "The Prima Facie Section 1983 Case," in Frelich & Carlisle, eds, *Section 1983: Sword and Shield*, p 121 (1983).]

A number of federal courts and state supreme courts have concluded, on the basis of *Quern*, that Congress did not intend the term "person" in § 1983 to include states and state agencies. See, e.g., *Ruiz v Estelle*, 679 F2d 1115, 1137 (CA 5, 1982), modified on other grounds 688 F2d 266 (CA 5, 1982), cert den 460 US 1042 (1983) ("Congress in enacting § 1983, did not intend 'to override the traditional sovereign immunity of the states.' Thus neither states nor state agencies are 'persons' within the meaning of § 1983"); *Vermett v Hough*, 606 F Supp 732, 743 (WD Mich, 1984) ("Moreover, neither a state nor its departments and agencies are 'persons' within the meaning of § 1983, and thus are not subject to suit under this statute"); *Merritt v Idaho*, 108 Idaho 20, 26; 696 P2d 871 (1985) ("We interpret *Quern v Jordan* to hold not only that § 1983 does not abrogate the states [sic] eleventh amendment immunity, but also as holding that states are not 'persons' for purposes of § 1983"); *Alaska v Green*, 633 P2d 1381, 1382 (Alas, 1981) ("We interpret *Quern v Jordan* as holding not only that § 1983 does not abrogate the state's eleventh amendment immunity, but as holding that states are not 'persons' within the meaning of the section"); *Woodbridge v Worchester State Hosp*, 384 Mass 38, 44-45, n 7; 423 NE2d 782 (1981) ("As is made clear by the concurring opinions of Justice Marshall and Brennan in *Quern v Jordan* . . . the majority reaffirmed the Court's prior holding in *Edelman v Jordan* . . . that States are not 'persons' for purposes of § 1983, and thus are not liable for retroactive awards of damages in suits based on the statute"); *Boldt v Wisconsin*, 101 Wis 2d 566, 584; 305 NW2d 133 (1981), cert den 454 US 973 (1981) ("The United States Supreme Court has held that a state is not liable under sec. 1983 because a state is not a 'person' within the meaning of sec. 1983. According to *Quern v Jordan* . . ., the immunity of the states to suit is not destroyed by sec. 1983 and a state may not be sued even in a sec. 1983 action without its consent"); *Edgar v Washington*, 92 Wash 2d 217, 221; 595 P2d 534 (1979), cert den 444 US 1077 (1980) ("The question before the court in *Quern*, as Justice Brennan's dissent quite clearly points out, was whether the word 'person' as used in [§ 1983] included states. It is the inescapable holding of the court that it did not"); *Hampton v Michigan*, 144 Mich App 794, 799-800; 377 NW2d 920 (1985) ("[I]t is our opinion based on *Quern* and decisions of other states that the term 'person' in § 1983 was not intended to include states and state agencies").

Other post-*Quern* courts still conclude that the state is a person for purposes of § 1983. Most then address the question of immunity, either allowing

suit to proceed or barring suit or liability on the basis of the absence or presence of Eleventh Amendment or state nonconstitutional, sovereign immunity, depending on whether the action is in a federal or a state court. See, e.g., *Della Grotta v Rhode Island*, 781 F2d 343, 347, 349 (CA 1, 1986) ("Della Grotta is not barred by the eleventh amendment from bringing this section 1983 action against the State itself." "[And] [w]here, as here, a state has waived its eleventh amendment immunity, there is no principled reason to distinguish between states and municipalities as 'persons' suable under section 1983"); *Weisbord v Michigan State Univ*, 495 F Supp 1347, 1345-1355, 1357 (WD Mich, 1980) (citations omitted) ("This Court is of the opinion that [state agencies] are 'persons' within the meaning of 42 USC § 1983." "[But] [u]nless the state is found to have waived its Eleventh Amendment immunity . . . or Congress has specifically abrogated that immunity . . . a suit for retrospective relief against state officials would be barred." "Accordingly, plaintiff's attempt to secure money damages or other retrospective relief from defendants is precluded by the eleventh amendment . . . "); *Uberoi v Univ of Colorado*, 713 P2d 894, 904 (Colo, 1986) ("We . . . hold that the eleventh amendment does not apply to Uberoi's § 1983 claim because that amendment is jurisdictional in that it prohibits citizens from bringing suit against states in federal courts. Uberoi initiated the suit in state court, not federal court. We also hold that the university is a 'person' under § 1983"); *Karchefske v Dep't of Mental Health*, 143 Mich App 1, 7; 371 NW2d 876 (1985) (citations omitted) ("Not only are we persuaded that *Quern* does not hold that a state is not a § 1983 'person,' but we find within the *Quern* opinion some evidence that the state in fact is such a person").

In three early pre-*Quern* and pre-*Monell* cases, this Court, the United States District Court for the Western District of Michigan, and the Sixth Circuit Court of Appeals concluded that § 1983 did not include states as persons. All three premised their reasoning on *Monroe*'s holding that § 1983 did not include municipalities as persons.

In *Hirych v State Fair Comm*, 376 Mich 384, 394; 136 NW2d 910 (1965), this Court stated that

> [u]nder the construction given the Federal civil rights act in [such cases as *Monroe*], the fair authority and the State of Michigan are . . . clearly not within the purview of [§ 1983].

Two years later, in *Deane Hill Country Club, Inc v Knoxville*, 379 F2d 321, 324 (CA 6, 1967), cert den 389 US 975 (1967), the Court of Appeals also decided that the term "person" in § 1983 did not include states. After discussing *Monroe*'s application to a suit against the city of Knoxville, the court concluded that

> the State of Tennessee [was] not liable as a "person" within the meaning of [§ 1983] . . . . [Citation omitted.]

Finally, in *Glancy v Michigan Dep't of Corrections Parole Bd*, 287 F Supp 34, 36 (WD Mich, 1968), the court found that a state agency did not fall within the statutory language of § 1983.

> It is also clear that § 1983 is directed at "persons" . . .; § 1983 is not directed at governmental agencies or units. *Monroe v Pape*. . . . The Michigan Parole Board is not a "person" within the meaning of § 1983, supra. Rather, it is a governmental agency or unit, and as such, without the pale of the Civil Rights Act. [Citation omitted.]

Because the rationales of *Hirych*, *Deane Hill*, and *Glancy* were premised on the Supreme Court's decision in *Monroe*, which was overruled by *Monell*, the value of these cases as precedent for the proposition that § 1983 does not include states as persons is questionable.

It is unfortunate that the Supreme Court's pronouncements on this subject were not rendered in § 1983 actions arising in state courts so that the "person" issue could have been decided on its own merits, rather than as a reflection of an Eleventh Amendment analysis. Nonetheless, we do think a direct answer to the "person" question is discernible and much needed to resolve the conflicting Court of Appeals views before us.

An historical analysis of the reasons why Congress enacted the Ku Klux Klan Act of 1871 provides some support for the idea that Congress' failure to abrogate the states' Eleventh Amendment immunity indicated it never intended to subject states to suit as persons pursuant to § 1983. Section 1 of the Ku Klux Klan Act, the precursor of § 1983, specifically conferred jurisdiction on the lower federal courts to hear claims on the basis of deprivations of federal rights. In fact, in 1871, the lower federal courts did not yet have federal question jurisdiction. Congress granted jurisdiction to the federal courts, much to the outrage of many congressmen, in order to afford state citizens a forum to rectify violations of federal rights not adequately redressed by state courts.

> "I stand here this day to affirm that [the courts of my home state of Ohio] will give fair and impartial redress to any man whose rights under the Constitution have been violated by anyone whomsoever. I am unwilling to say to the people of Ohio that the Congress of the United States thinks their judiciary so unsafe or so unworthy of trust that the people must seek redress in the courts of the United States." [Zagrans, *"Under color of" what law: A reconstructed model of section 1983 liability*, 71 Va L R 499, 557, n 312, citing Cong Globe, 42nd Cong, 1st Sess, App 216 (1871) (comments of Senator Thurman of Ohio).]

But in 1871, the Eleventh Amendment barred suit against a state in federal court, and, in *Quern*, the Supreme Court held that Congress did not abrogate the states' Eleventh Amendment immunity when it enacted § 1983. Thus, Congress contemplated that, at the very least, states would not be subjected to suit as persons in federal court.

In *Marrapese v Rhode Island*, 500 F Supp 1207, 1212, n 11 (D RI, 1980), however, the court suggested that

> Congress' refusal to force a waiver of Eleventh Amendment immunity would not necessarily render meaningless the inclusion of states within the ambit of § 1983 even in cases where voluntary waiver was not forthcoming. In states where sovereign immunity has been legislatively or judicially abrogated, § 1983 plaintiffs could take their claims against the state into state court.

This statement, however, completely fails to take account of the historical circumstances surrounding the enactment of § 1983. Congress specifically conferred jurisdiction on the federal courts because the state judicial system had failed in the enforcement of federal constitutional rights. To argue that aggrieved plaintiffs could seek relief in state courts is to ignore the historical motivation behind enactment of § 1983. Congress was

> "driven by existing facts to provide for the several states in the South what they [were] unable to

fully provide for themselves, i.e., the full and complete administration of justice in the courts." [*Mitchum v Foster,* 407 US 225, 241; 92 S Ct 2151; 32 L Ed 2d 705 (1972), citing Cong Globe, 42nd Cong, 1st Sess, 653 (1871) (comments of Senator Osborn).]

Furthermore, as fully quoted above, *ante,* p 554, President Grant said that "the power to correct these evils is beyond the control of state authorities, I do not doubt"; and the United States Supreme Court in *District of Columbia v Carter, supra* at 427, said "[t]he solution chosen was to involve the federal judiciary. . . . Congress recognized the need for original federal court jurisdiction . . . ." It was quite obvious that, in enacting the predecessor of § 1983, the Forty-second Congress intended to provide a remedy in federal, not state courts.

We cannot improve on the conclusion of our own Court of Appeals in *Hampton v Michigan, supra* at 797-800, when it said:

> Although *Quern* involved Eleventh Amendment immunity, which, of course, is inapplicable to suits brought in state court, other appellate courts have interpreted the *Quern* language that § 1983 was not intended to abrogate existing immunity of the states, as tantamount to a holding that a state is not a "person" within § 1983.
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> It is true that *Quern* may be interpreted as dealing only with the states' Eleventh Amendment immunity, thus leaving open the possibility that Congress intended to permit § 1983 actions against states in state courts. We find it unlikely, however, that Congress would have intended to enact a statute creating a remedy for violation of civil rights, while at the same time precluding private individuals from bringing actions under the statute against states in federal court but permitting such actions against states in state courts.
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> • • •
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> [I]t is our opinion based on *Quern* and decisions of other states that the term "persons" in § 1983 was not intended to include states and state agencies.

Moreover, the circumstances surrounding passage of § 1983 further support our conclusion that, in enacting § 1983, Congress did not intend to subject states to suit as persons. To begin with, § 1 of the Ku Klux Klan Act, now § 1983, occasioned very little debate, suggesting that the provisions of that section were considered fairly noncontroversial.

> Debate on the [Ku Klux Klan Act] was extensive. Over one hundred members of both houses presented speeches, most of them opposing passage. Only twenty-eight speakers, less than one-third of those addressing the Act, mentioned section 1. Of those, about half opposed the section; four who opposed the bill in general nonetheless approved of section 1. [Zagrans, *supra* at 549-550.]

Lifting the states' Eleventh Amendment immunity and exposing them to suits for damages, however, was a controversial proposition in 1871. In fact, the absence of debate on a proposition as controversial as directly interfering with state treasuries is indeed "amazing." See Nowak, *The scope of congressional power to create causes of action against state governments and the history of the Eleventh and Fourteenth Amendments,* 75 Colum L R 1413, 1467, n 257 (1975).

> In none of the debates was it argued that state governments would be hurt because the section imposed financial liability upon them for viola-

> tions of the amendment, and at no point in the debates did the proponents of the bill mention that such a provision was contained therein. [Nowak, *supra* at 1465-1466.]

Thus, the limited debate on § 1 indicates that, in enacting § 1983, Congress did not intend to abrogate the states' Eleventh Amendment immunity and expose the states to suit for damages pursuant to § 1983. See also *Quern, supra* at 355, n 10.

In addition, the Dictionary Act, enacted two months prior to the Ku Klux Klan Act, does not preclude the conclusion that Congress did not intend § 1983 to include states as persons. The Dictionary Act, providing a few general rules of statutory construction, stated that the word "person" could apply to "bodies politic and corporate." But the Dictionary Act was enacted five years *after* the model for § 1 of the Ku Klux Klan Act, § 2 of the Civil Rights Act of 1866.

> While [the Dictionary Act] was enacted two months before the enactment of the 1871 Civil Rights Act, it came more than five years *after* passage of § 2 of the Civil Rights Act of 1866, 14 Stat 27, which served as the model for the language of § 1 of the 1871 Act. Cong Globe, 42d Cong, 1st Sess, App 68 (1871) (remarks of Rep. Shellabarger) . . . . [*Quern, supra* at 341, n 11. Citation omitted.]

See also Zagrans, *supra* at 550.

In conclusion, we agree with the majority in *Quern* that it was not the intention of the Forty-second Congress that states could be sued in a federal § 1983 action and with concurring Justice Brennan that that was tantamount to deciding that the word "person" as used in § 1983 was not intended in any action to include a sovereign state.

The circumstances surrounding passage of § 1983 further support this conclusion. Therefore, on the states-as-persons issue, we would affirm the decision of the Court of Appeals in *Will,* and reverse the decision of the Court of Appeals in *Smith.*

III. ARE STATE OFFICIALS PERSONS?

We next consider the status and liability of the Director of the State Police as a party, in light of our holding that the state and its departments are not proper parties to a § 1983 lawsuit.

In his brief to this Court, plaintiff does not claim that he sued the director in his personal capacity. In fact, in framing his second issue—whether § 1983 included the state and its agencies and officials as persons, Will states:

> The State of Michigan, its department of state police, and its officers acting in their *official capacities* are "persons" under 42 USC 1983.

He further states:

> There is no question that a lawsuit against the Director of State Police would be proper under 42 USC 1983. Individuals are definitely "persons" for purposes of 42 USC 1983 even where they are also officials of the government. . . . In this case Plaintiff sued the Director of the State Police, as well as his department. Since the Court of Claims can render a judgment in an action "ex delicto" against the State based on the acts of the Director of the State Police *acting in his official capacity,* it is logical to conclude that this same official ought to bind the State when sued for official actions accomplished in violation of 42 USC 1983. [Emphasis added.]

Moreover, the early pleadings in the *Will* case

indicate that Mr. Will sued the Director of State Police in his official capacity. Neither Mr. Will's complaint in the Ingham Circuit Court nor in the Court of Claims named the Director of the Michigan State Police personally. All references to the director related only to the *office* of the Director of State Police. In fact, the Director of State Police is mentioned in only one count, the Michigan constitutional claim, in both the Ingham Circuit Court and Court of Claims complaints. Neither reference, however, names the director personally.

The state in its brief in this Court, aptly points out that

> [t]he action was not brought against the Director by name, it was brought against the Director by official title only.

It is apparent that Mr. Will brought suit for damages under § 1983 against the Director of the Michigan State Police in his official capacity. Nothing in the record suggests otherwise.

We deal then only with the question whether a state official being sued in an official capacity for retroactive relief is a person for purposes of § 1983. We would answer in the negative, substantially on the basis of the same analysis employed in part II.

Ex parte Young, supra, helped to lay the groundwork for the Supreme Court's development of the concept of official- versus personal-capacity suits. In *Young,* the Court carved out an exception to the Eleventh Amendment's prohibition against suing a state in federal court. The Court found the Eleventh Amendment to be no bar to an official-capacity suit for injunctive relief against the Attorney General of Minnesota, Edward Young. Though not identified as an official-capacity suit by

the Court, the form of relief sought, an injunction, indicated the nature of the action. After all,

> [i]f directed against officials in their individual capacity, injunctions would be useless . . . because the purpose of such relief is to change unconstitutional official acts or practices. [Nahmod, *supra* at § 6.04, p 343, n 48.]

Despite the obvious effect on the state, the Court claimed that the injunction operated only against the person of Mr. Young. By "stripping away" the official or representative character of the state attorney general, the Court created the legal fiction that the plaintiffs in *Young* actually sought relief against Mr. Young, not against the state itself.

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. [*Young, supra* at 159-160.]

But in *Ford Motor Co v Indiana Dep't of Treasury,* 323 US 459; 65 S Ct 347; 89 L Ed 389 (1945), the Supreme Court found the Eleventh Amendment to be a bar to the recovery of monetary damages from state officials sued in their official capacities. The Court viewed such relief as operating against the state itself, despite the fact that individual state officials were sued.

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to

invoke its sovereign immunity from suit *even though individual officials are nominal defendants.* [*Ford Motor, supra* at 464. Citations omitted, emphasis added.]

The Supreme Court, therefore, found that the Eleventh Amendment did not preclude official-capacity suits for injunctive relief because such suits "stripped" an official of his "official or representative character," thus exposing only the *individual* occupying the office to liability. But the Eleventh Amendment *did* bar official-capacity suits for monetary relief because such actions were, in effect, suits against the state itself, despite the presence of individual officials as nominal defendants.

In *Edelman, supra,* the Court sought to clarify its earlier holdings in *Ex parte Young* and *Ford Motor,* analyzing a lower federal court's order of relief in light of those two decisions.

> [T]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. . . .
>
> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman. Addressing himself to a similar situation in *Rothstein v Wyman,* 467 F2d 226 (CA 2, 1972), cert den 411 US 921 (1973), Judge McGowan observed for the court:
>
> • • •
>
> "It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force. . . ."
>
> We agree with Judge McGowan's observations. The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself, *Ford Motor Co v Dep't of Treasury, supra,* than it does the prospective injunctive relief awarded in *Ex parte Young.* [*Edelman, supra* at 664-665.]

The Court therefore rejected any distinction between equitable and monetary relief as the line separating permissible versus prohibited relief in official-capacity suits in a federal court. Instead, the Court looked to the prospective versus retroactive nature of the relief sought.

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young* . . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to

> spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*. [*Edelman, supra* at 667-668. Citation omitted.]

Finally, *Alabama v Pugh,* 438 US 781; 98 S Ct 3057; 57 L Ed 2d 1114 (1978), made clear that the Court's distinctions between prospective and retroactive relief only applied to suits against state officials in their official capacities. In *Pugh,* the Court held that issuance of a mandatory injunction against the State of Alabama ran afoul of the Eleventh Amendment. Since the Eleventh Amendment prohibited suit against the state in federal court, any form of relief sought against the state as a *named* defendant was barred.

> Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, . . . a State cannot be sued directly in its own name regardless of the relief sought. *Alabama v Pugh*. . . . Thus, implementation of state policy or custom may be reached in federal court only because official capacity actions for prospective relief are not treated as actions against the State. See *Ex parte Young*. . . . [*Kentucky v Graham,* 473 US 159, 167, n 14; 105 S Ct 3099; 87 L Ed 2d 114 (1985). Citations omitted.]

In conclusion, an individual may not sue a state as a named defendant in a federal court either for prospective or retroactive relief. A party may institute suit in federal court against a state official in his official capacity for prospective relief, on the basis of a violation of federal law, but the Eleventh Amendment would bar any action seeking retroactive relief. But, see, *Pennhurst State School & Hosp v Halderman,* 465 US 89; 104 S Ct 900; 79 L Ed 2d 67 (1984).

By the same Eleventh Amendment rationale that led us to conclude that a state is not a person and not liable regardless of the forum, we conclude that a state official sued in an official capacity for retroactive relief is not a person under § 1983.

The case law supports this extension of the distinction between official- and personal-capacity actions to suits in which the Eleventh Amendment does not apply. In *Brandon v Holt,* 469 US 464; 105 S Ct 873; 83 L Ed 2d 878 (1985), the Supreme Court addressed the liability for damages under § 1983 of a municipal police director sued in his official capacity. In dicta, the Court noted that before *Monell,* its decision in *Monroe* precluded suit against a municipal official in his official capacity because *Monroe* did not recognize municipalities as persons for purposes of suit under § 1983.

> In *Monroe v Pape,* . . . the Court held that a city was not "a person" within the meaning of 42 USC § 1983. That construction of § 1983 protected municipalities from liability in cases *of this kind* until June 6, 1978, when we decided *Monell v New York City Dep't of Social Services* . . . . The complaint in this case was filed on February 22, 1978, before *Monroe v Pape* was overruled; this explains why the city of Memphis was not named as a defendant in this case. The timing of the complaint may also explain why petitioners did not expressly allege at the outset of the litigation that they were suing Chapman in his official capacity as Director of Police of the Memphis Police Department. [*Brandon, supra* at 469. Citations omitted, emphasis added.]

See, also, Nahmod, *supra* at § 6.04, pp 343-344.

The Court of Appeals decision in *Will,* however,

confused the differences between official- and personal-capacity suits. At first, while discussing the Court of Claims jurisdiction over § 1983 damage actions against state officials, the Court noted that Mr. Will sued the Director of State Police in his *official* capacity.

> [I]t must be noted that plaintiff did not sue the state officials in their individual capacities, so a suit against them in federal court for damages would be barred by the Eleventh Amendment because the state would be the party in fact. [*Will, supra* at 220-221. Citations omitted.]

The Court then concluded that the state was not a person for purposes of § 1983, but at the same time remanded to the trial court the question of the state director's possible immunity from liability for § 1983 damage actions. Since the state and, therefore, the director, sued in his official capacity, is not a person under § 1983, Mr. Will's suit seeking retroactive relief from the state director must fail, and the question of immunity in any form is then irrelevant. As the Supreme Court noted in *Kentucky v Graham, supra* at 168-169,

> [an official-capacity suit] is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

In conclusion, we would reverse the decision of the Court of Appeals in *Will* allowing suit against the Director of State Police and remanding to the trial court the question of the state director's immunity from liability for § 1983 damage actions.

IV. DOES SMITH'S "FALSE IMPRISONMENT" ESCAPE GOVERNMENTAL IMMUNITY?

We next deal with the issue raised in *Smith* as to whether an intentional tort, such as false imprisonment,[10] is an exception to governmental immunity either because it is not included within the meaning of the word "tort" in § 7 of the governmental immunity act, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq.*, or because it is not an exercise of a "governmental function" under § 7 of that act.[11] Section 7 of the governmental immunity act provided:

> Except as in this act otherwise provided, all governmental agencies shall be immune from tort

[10] In support of his false imprisonment claim, plaintiff's Court of Claims complaint stated:

> 12. When Jack Smith was sent to and/or transferred to the Michigan Home and Training School (Lapeer State Home and Training School), same was done without proper order and authority, and therefore same was contrary to the applicable procedures prevailing at that time (understood to be 1923 PA 151, § 11, as amended by 1925 PA 283); further, upon information and belief, said transfer was contrary to the 1923 PA 151, § 21 (the former citation compiled in CL 1929, § 6888 and the second compiled in CL 1929, § 6898).
>
> 13. Said confinement at said Michigan Home and Training School (Lapeer State Home and Training School) was done intentionally by the applicable employees and representatives of the responsible Defendants, by the applicable institutions described and by the State of Michigan.

There is no question that the confinement of plaintiff was intentional. If no more intentional acts were alleged, we could question the need for an intentional tort analysis because the Department of Mental Health has as part of its responsibility the involuntary confinement of certain persons. However, the plaintiff in another section of his complaint also alleged the intentional failure to use the proper procedure for his confinement. This is sufficient to make an intentional tort analysis necessary.

[11] The parties apparently assume that § 7 of the current governmental immunity act applies to the facts of *Smith*. Therefore, our analysis is based on that assumption.

> liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed. [MCL 691.1407; MSA 3.996(107).][12]

A plaintiff must plead facts in his complaint in avoidance of immunity, indicating that the alleged tort falls outside the protection afforded by sovereign or governmental immunity. See *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 621, n 34; 363 NW2d 641 (1984); *Galli v Kirkeby*, 398 Mich 527, 532, 540-541; 248 NW2d 149 (1976); *McCann v Michigan*, 398 Mich 65, 77; 247 NW2d 521 (1976) (opinion of RYAN, J.).[13]

> This may be accomplished by stating a claim which fits within one of the statutory exceptions or pleading facts which demonstrate that the tort occurred during the exercise or discharge of a nongovernmental or proprietary function. [*Ross, supra* at 621, n 34.]

Mr. Smith's claim of false imprisonment, however, does not fit within one of the statutory exceptions

[12] Earlier this year, the Michigan Legislature enacted 1986 PA 175, which significantly amended § 7 of the governmental immunity act. The provision cited in the text accompanying this footnote remained essentially the same. The major change in § 7 was in the addition of §§ 7(2) through 7(5).

[13] The reason for the "requirement" that plaintiff state facts in his pleadings in avoidance of immunity is that

> [s]overeign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability upon the governmental agency. *Galli, supra*, p 541, fn 5; *McCann, supra*, p 77, fn 1. [*Ross, supra* at 621, n 34.]

to the governmental immunity act.[14] Therefore, the facts of his complaint must demonstrate that the state defendants' actions in falsely imprisoning him did not involve the exercise or discharge of a governmental function unless, of course, there is a specific exemption for an intentional tort.

The Court of Claims in granting summary judgment for defendant recognized no such exception for an intentional tort, finding that an act "may be an exercise or discharge of a governmental function even though it amounts to an intentional tort." That court further held:

> [T]he Court is of the opinion the alleged confinement is protected by governmental immunity. The care, treatment, and custody of Plaintiff, whether as a ward of the state at a state orphanage or mental facility, were governmental functions. The MHTS transfer and confinement of Plaintiff in furtherance of his care and treatment were "sufficiently related" to the custodial function of the orphanage or mental facility to be in the exercise or discharge of these governmental functions. . . . There exists no allegation that Plaintiff's confinement resulted from a malicious or improper motive completely unrelated to the treatment and care of Plaintiff. See *McCann, supra*. Nor does the intentional tort alleged reach the assaultive level of obviously unlawful conduct found in *Kriger* [*v South Oakland Co Mutual Aid Pact*, 399 Mich 835; 250 NW2d 67 (1977), rev'g 49 Mich App 7 (1973)] or *Lockaby* [*v Wayne Co*, 406 Mich 65; 276 NW2d 1 (1979)].

The Court of Appeals, however, reversed, remanding the false imprisonment claim to the parties for reformulation of their pleadings consistent with its

[14] See MCL 691.1402; MSA 3.996(102) (highway repair); MCL 691.1405; MSA 3.996(105) (negligent operation of government-owned motor vehicle); MCL 691.1406; MSA 3.996(106) (public buildings); MCL 691.1413; MSA 3.996(113) (proprietary function).

test that *unjustified* intentional acts did not constitute the exercise or discharge of a governmental function.

> Thus, whenever a plaintiff in a complaint alleges an intentional tort, a defendant may answer arguing that the allegation should be dismissed due to governmental immunity because the action was justified under the particular facts of the case. If the plaintiff does not contest these facts, the allegation would subsequently be dismissed. However, if the plaintiff does contest the facts underlying the justification, the case would proceed to trial. [*Smith, supra* at 346.]

We agree with the reasoning of the Court of Claims; no intentional tort exception exists, and an act "may be [the] exercise or discharge of a governmental function even though it results in an intentional tort." As will be seen, a majority of this Court has never expressly recognized an intentional tort exception to the governmental immunity act.[15] But, in several cases involving intentional torts, the Court has allowed suit to proceed

[15] Interestingly enough, two treatises on governmental liability cite Michigan cases for the proposition that certain jurisdictions recognize an "intentional tort" exception to governmental immunity.

> It has been held that an intentional tort could not constitute the exercise or discharge of a governmental function for the purposes of sovereign immunity. *Shunk v State*, 97 Mich App 626; 296 NW2d 129 (1980) [app den *Shunk v Northwest Industries*, 414 Mich 921 (1982); later app *Shunk v Michigan (After Remand)*, 132 Mich App 632; 347 NW2d 767 (1984)]. [Winborne, ed, Civil Actions Against State Government: Its Divisions, Agencies and Officers, § 2.41, p 91.]

Moreover, Sands and Libonati, in their multivolume treatise on local government law, cite *Lockaby v Wayne Co*, 406 Mich 65; 276 NW2d 1 (1979), as support for the statement that certain jurisdictions exempt intentional torts from the protection of governmental immunity. See 4 Sands & Libonati, Local Government Law, § 27.04, pp 27-22 to 27-32.

against the state or local agency despite the presence of governmental immunity.

In *McCann v Michigan, supra,* the plaintiff, a newspaper publisher, instituted suit against the State of Michigan, its Department of Mental Health, and the Traverse City State Hospital, alleging that hospital officials and employees wilfully and maliciously engaged in a campaign to destroy plaintiff's newspaper business. Plaintiff McCann filed suit for damages against the state in the Court of Claims, alleging various intentional torts, including interference with existing and future economic relations, libel, slander, and defamation. The Court of Claims, however, granted the defendants' motion for summary judgment on the basis of governmental immunity, and the Court of Appeals affirmed. This Court, though issuing four separate opinions, reversed and remanded the case to the Court of Appeals, unanimously agreeing that the activities involved did not constitute the exercise or discharge of a governmental function. However, not one member of the Court rested a decision on an explicit "intentional tort" exception to the governmental immunity act. Chief Justice KAVANAGH and Justice LEVIN concluded that the governmental immunity act did not apply because the day-to-day operation of a hospital did not constitute a governmental function.

Justice WILLIAMS found that

> defendant state agency's employees were clearly engaged in *ultra vires* activity and were not, therefore, involved "in the exercise or discharge of a governmental function." [*McCann, supra* at 73-74.]

Justice RYAN, using the pre-*Ross* "common good of all" test for determining a governmental function, concluded that Mr. McCann's complaint al-

leged facts which, if proved, justified the conclusion that the activities of the state and its agencies did not constitute a governmental function.

Finally, Justices FITZGERALD, COLEMAN, and LINDEMER summarily concluded that the complained-of activity did not involve the exercise or discharge of a governmental function. These three justices, however, would have remanded the case to the Court of Claims for an entry of dismissal. They concluded that although a court could impose vicarious liability on an employer for the intentional torts of its employees, the facts of the *McCann* case would not support an imputation of liability to the state or its agencies.

Approximately one month later, this Court decided another intentional tort case, *Galli v Kirkeby, supra*. *Galli* involved an action instituted against Arthur Kirkeby, an elementary school principal, Olin Adams, Supervisor of the Warren school system, and the Board of Education of the Warren Consolidated Schools by the parents of a student sexually assaulted on numerous occasions by Kirkeby. Summary judgment was denied, the Court of Appeals denied leave to appeal, and this Court remanded the case to the trial court for further proceedings.

Although three opinions were issued, again no justice found that proof of an intentional tort, in and of itself, removed a state or local agency's immunity under the governmental immunity act. Chief Justice KAVANAGH and Justices LEVIN and FITZGERALD concluded that the day-to-day operation of a school did not constitute the exercise or discharge of a governmental function.

Justices WILLIAMS and RYAN argued that the appeal involved questions both of direct liability against the school board for its negligence in screening and supervising personnel and of vicari-

ous liability for its employee's assaults upon a student. By examining the specific activity alleged against the governmental defendant, Justices WILLIAMS and RYAN concluded that the trial court erred in refusing to grant the school board's motion for summary judgment on the issue of the board's negligence because the board's actions in screening and supervising its personnel involved the exercise or discharge of a governmental function. But they agreed with the denial of summary judgment as to the board's vicarious liability for the intentional tort because such activity clearly did not constitute a governmental function.

> [T]he test of whether a governmental agency can claim immunity under the statute is whether the specific activity alleged against the governmental defendant falls within "the exercise or discharge of a governmental function."
>
> • • •
>
> We first address the question of whether the school board is immune from suit for its own negligence in allegedly failing to exercise due care in the hiring and supervision of Mr. Kirkeby. . . .
>
> [W]e find that the screening, hiring and supervision of school district personnel by the board in the course of its educational function was an act "in the exercise or discharge of a governmental function." . . .
>
> We next consider whether the school board is immune from suit with respect to the alleged tortious activity of its employee. No one will seriously argue that the intentional homosexual assault of a school principal upon a student falls within "the exercise of a governmental function." We hold it does not.
>
> The intentional homosexual assault of a school principal upon a school boy even on school time and on school property is not the same thing as negligent tunneling in road construction as in

Thomas. Rather the facts of this case are clearly analogous in principle to the facts in *McCann*.

In both this case and *McCann* a governmental agency is involved whose normal operation is "the exercise or discharge of a governmental function." However, in both cases an employee of the governmental agency engages intentionally in allegedly tortious action that bears no arguable relationship to the agency's function. [*Galli, supra* at 536-538.]

Finally, Justices COLEMAN and LINDEMER dissented from the result, concluding that the trial court erred in denying defendants' motion for summary judgment on the basis of the governmental immunity act.

> The school board and Mr. Adams at all times were acting within the exercise of their duties. The applicable statute grants immunity to school districts from tort liability in *all* cases in which it is acting within its governmental function with certain exceptions, none of which apply to these facts. We must not confuse Mr. Kirkeby's personal liability with that of the others. In clear language, the Legislature has spoken. If it finds it better public policy to exclude governmental units from immunity in cases where employees act outside of their scope of employment and commit personal offenses, the Legislature should act accordingly. [*Galli, supra* at 545.]

But, in *Lockaby v Wayne Co*, 406 Mich 65; 276 NW2d 1 (1979), three members of the Court interpreted *McCann, supra*, as recognizing an intentional tort exception to the governmental immunity act, claiming such a tort could never constitute a governmental function. The case involved a suit instituted against the Wayne County Sheriff, the Administrator of the Wayne County jail, and various city and county governmental agencies by James Lockaby, who suffered injuries rendering

him a quadriplegic while incarcerated in the Wayne County jail and hospitalized at Detroit General Hospital. Mr. Lockaby eventually filed a five-count amended complaint in the Wayne Circuit Court, the dismissal of which formed the basis for his appeal. Only count I of that complaint, alleging "intentional infliction of injury," which was dismissed on the grounds of governmental immunity, is of interest here.

The Court unanimously agreed to reinstate Mr. Lockaby's claim of intentional infliction of injury, although once again it failed to reach a consensus on the reasons for doing so. Justice LEVIN, in an opinion joined by Justices KAVANAGH and FITZGERALD, concluded that plaintiff's claim of intentional injury survived dismissal on the basis of the governmental immunity act because an intentional tort did not constitute the exercise or discharge of a governmental function.

> Lockaby also claims that he was intentionally injured by agents of the county. While the county is constitutionally immune from "responsib[ility]" for the sheriff's "acts" that immunity does not extend to the acts of others in its employ. In *McCann v Michigan*, 398 Mich 65; 247 NW2d 521 (1976), in separate opinions, a majority of the Court agreed that an intentional tort was not in the exercise or discharge of a governmental function; the cause was remanded, as it is here, for further proceedings. [*Lockaby, supra* at 77.]

Justice COLEMAN also agreed to reinstatement of plaintiff's count I, basically referring to Justice WILLIAMS' separate opinion for her reasons for doing so.

> [Plaintiff's] allegations state a claim in avoidance of governmental immunity against the

named defendants. Liberally construed and viewed in the light most favorable to the plaintiff, they make out a possible case of intentionally tortious acts committed by agents of the defendants, thus potentially not within "the exercise or discharge of a governmental function." [*Lockaby, supra* at 78.]

Justice WILLIAMS concurred in the result reached in Justice LEVIN's opinion, but clarified his understanding of the Court's decision in *McCann, supra*. Justice WILLIAMS did not interpret *McCann* as establishing the proposition that governmental agencies that commit intentional torts *never* enjoy the protection of the governmental immunity act.

As in Count I, I concur in the result advanced in Justice LEVIN's opinion but I would add a caveat. Count I is captioned "Intentional Infliction of Injury." The opinion, citing *McCann v Michigan*, 398 Mich 65; 247 NW2d 521 (1976), states that "a majority of the Court agreed that an intentional tort was not in the exercise or discharge of a governmental function." The statement is not incorrect as explaining the ultimate holding under the facts of *McCann*, but I do not read *McCann* as authority for the broad proposition that intended conduct which harms another is never protected by governmental immunity. A tort is a civil wrong and conduct which is wrong within one setting can be permissible within another. For example, a police officer may not intentionally strike a citizen peacefully walking down the street, but his duty may require the police officer to intentionally strike another citizen to prevent him from murdering a third peaceful citizen. Further, *McCann* clearly sets limits that the conduct must be without and not within the scope of the exercise and discharge of a governmental function. As stated in my sole opinion in *McCann*, it is the *ultra vires* activities of public employees which are not protected by the doctrine of governmental immunity.

While Count I is not well pleaded with respect to *McCann*, because I find that *ultra vires* conduct may be possibly proven, within the inartful language, I concur with Justice LEVIN that it was erroneously dismissed. [*Lockaby, supra* at 82-83.]

Finally, Justice MOODY, although voting to reinstate plaintiff's claim for intentional infliction of injury, did not discuss the relevance of the governmental immunity act.

It would appear from the foregoing that no member of this Court has directly said that there is an intentional tort exception to governmental immunity, as such, although three members in *Lockaby* said an intentional tort could never involve the exercise or discharge of a governmental function. It would also appear, on reexamination, that contrary to the view of three justices in *Lockaby*, a majority of the Court in *McCann* did not agree "that an intentional tort was not in the exercise or discharge of a governmental function."

Similarly, the Court of Appeals, in *Smith, supra*, did not establish a blanket intentional tort exception to the governmental immunity act. Instead, the Court developed a test that turned on whether the governmental agency's intentionally tortious activities were *justified* under the circumstances of the case. The Court sought a middle ground, attempting to integrate the two basic positions in *Lockaby*—Justice LEVIN's exception for all intentional torts with Justice WILLIAMS' conclusion that only intentional torts that are ultra vires remove a governmental agency's immunity from liability.

Three justices on the Supreme Court have stated that the government is not immune from an intentional tort. . . .

On the other hand, three other justices have held that an intentional tort allegation takes the

parties outside governmental immunity only if the intentional tort is *ultra vires*. . . .

Despite this apparent conflict, we believe that the two views can be reconciled. If a police officer lawfully arrests an individual, he may use reasonable force if that individual resists. . . . Both sides would agree that the police officer is immune by governmental immunity from any suit alleging an intentional tort. However, both sides would also agree that the police officer is not immune if he uses force if the arrestee did not resist or if the officer used unreasonable force.

Underlying Justice LEVIN's opinion (in *Lockaby*) is the argument that the state is never in the business of committing intentional torts. Justice WILLIAMS' opinion clearly states a concern that the state not be liable where a public employee is required to commit an intentional tort to carry out his duty to the public. Both views recognize the reasons for governmental immunity and define immunity within its own perception of what the state's duty may entail. Both concerns may be met in a test which grants governmental immunity where the employee's actions were *justified* under the case's circumstances. Thus, a police officer's "assault" on a person attempting murder is justified by the overriding necessity of protecting the potential victim. The officer's duties include this protection and sometimes require extraordinary measures. An attendant at a state mental hospital may be justified in "assaulting" a patient where the patient threatens the safety of himself or others but would not be justified in assaulting the same patient where the patient is merely recalcitrant in dressing. Justice LEVIN's concern that the state not be privileged in abusive behavior does not apply where the circumstances require such extraordinary actions and so justify taking the measures. Likewise, Justice WILLIAMS' concern that the state not be punished for acting where it must is also met. [*Smith, supra* at 345-346.]

In order to now decide whether to recognize any

form of intentional tort exception to the governmental immunity act, this Court must first determine whether the Legislature intended the term "tort liability" in § 7 of the act to exclude intentional torts. We conclude that nothing on the face of the statute indicates an intent to create such an exception.

> [T]he immunity from tort liability provided by § 7 is expressed in the broadest possible language —it extends immunity to all governmental agencies for *all tort liability* whenever they are engaged in the exercise or discharge of a governmental function. This broad grant of immunity, when coupled with the four narrowly drawn statutory exceptions, suggests that the Legislature intended that the term "governmental function" be interpreted in a broad manner. [*Ross, supra* at 618. Emphasis added.]

Moreover, as the state defendants aptly note, the Michigan Legislature's response to this Court's decision in *Maki v East Tawas*, 385 Mich 151; 188 NW2d 593 (1971), indicates that the Legislature intended the immunity conferred by the governmental immunity act to extend to intentionally tortious, as well as negligent, activity.

> The history of the governmental immunities [sic] act indicates that the Legislature clearly envisioned that intentional torts would be within the ambit of the immunity conferred by the act. In *Maki*, . . . this Court examined the governmental immunity act as it then existed. At that time, the operative section of the act, MCL 691.1407; MSA 3.996(107) provided immunity from *tort* liability. The title of the act, however, referred to immunity from *negligence* liability. The Court held that the act was unconstitutional as then written because the body of the act, in providing immunity from

tort liability, was much broader than the immunity from negligence liability referred to in the title of the act, thus violating Const 1963, art 4, § 24. In the course of its opinion, the Court made the following observation:

". . . It is apparent from even a cursory examination of any legal encyclopedia or dictionary that an action based on 'negligence' is a species of a generic action based in torts. As the trial judge pointed out, the headings in *Prosser on Torts* refer to actions based on nuisance, direct trespass, assault and battery, false arrest, deceit, defamation, abuse or [sic] process, malicious prosecution and economic duress—all of which are tort actions apart from negligence and all of which might be brought against a governmental body."

The types of actions mentioned in the statement of the Court are what are commonly referred to as intentional torts.

Following the Court's decision in *Maki*, the Legislature amended the act, not by changing the language of MCL 691.1407; MSA 3.996(107) to say "negligence," but rather by amending the title of the act by eliminating the reference to "negligence." Therefore, the act, as amended, was intended by the Legislature to cover intentional torts and not to apply solely to negligence actions.[16]

We agree and restate, it is hoped in clearer fashion than heretofore, that the Legislature did not intend to exclude intentional torts when committed by governmental agencies in the course of a governmental function. It only remains then to

[16] Section 7 was found unconstitutional because it granted immunity from *all* tort liability. In contrast, the title of the governmental immunity act created immunity for injuries caused by negligence alone. Since negligence is only one species of tort, § 7 *unconstitutionally conferred much broader immunity than the title allowed.* [*Ross, supra* at 606, n 21. Emphasis added.]

decide if an intentional tort can arise out of the exercise of a governmental function.

It is obvious, from the review of our struggles with the intentional tort issue and the Court of Appeals attempt in this case to reconcile our efforts, that a clearer standard is needed to decide this issue, as well as to assist the bench and bar. Our previous multiopinion decisions have shown the difficulty of that task. In the *McCann, Galli,* and *Lockaby* trilogy, the Court was not so much divided with regard to the answer to the intentional tort question as it was fractionalized with regard to how to pose the question. The analyses behind this trilogy centered on three aspects of the problem. In each case, there were at least two justices who viewed the governmental mission out of which the activity in question arose as being a nongovernmental function, thereby ending their inquiry. This was part of the then-uncertain state of the law as to the meaning of governmental function. In *Galli,* there was discussion by several justices who found the governmental units vicariously liable, even though they were not directly liable, because the employees' *tortious acts* did not amount to a governmental function.[17] Finally, there was present in each case discussion by some justices as to what level of activity to examine in determining the governmental function question, i.e., the general activity of the unit of government and its programs or the specific conduct that was underway when the alleged tort occurred.

Fortunately, since we last visited the intentional

[17] Under *Ross,* this could not occur because a court, in determining both direct and vicarious liability, must examine the general activity not the specific tortious acts involved at the time the alleged tort occurred.

Neither party has distinguished whether the alleged conduct of the state officers, agents, or employees in *Smith* is direct or vicarious, see n 19, nor do we find it necessary to the decision of this case.

tort issue, we have clarified and resolved the first two aspects of the problem. In *Ross,* we more clearly set forth a criterion for determining what constitutes a governmental function.[18] We also, in *Ross,* definitively established the parameters for vicarious liability.[19] What we have not yet definitively decided is at what level of activity—governmental mission, general activity, or the alleged tortious conduct—to apply the governmental function test. Only this determination will make it

[18] We therefore conclude that a governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. When a governmental agency engages in mandated or authorized activities, it is immune from tort liability, unless the activity is proprietary in nature (as defined in § 13) or falls within one of the other statutory exceptions to the governmental immunity act. Whenever a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (i.e., an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function. The agency is therefore liable for any injuries or damages incurred as a result of its tortious conduct. [*Id.* at 620.]

[19] A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. See *Hirych v State Fair Comm,* 376 Mich 384, 391-393; 136 NW2d 910 (1965), and *Sherbutte v Marine City,* 374 Mich 48, 50; 130 NW2d 920 (1964) (city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity). [*Id.* at 625.]

possible to decide if an intentional tort can arise out of an exercise of a governmental function.[20]

Plaintiff argues that this Court should focus on the specific *conduct* of the state or its officers, agents, or employees.

> In short, Plaintiff in this case was transferred on the strength of an administrative order while the statutes on the books clearly required a court adjudication and order. The one issuing the order should have known he had no authority to do so, and the ones who physically transferred Plaintiff to the mental institution acted in reliance on an order that was void on its face. It would be a perversion of the English language to say that this transfer, in clear violation of law, was "authorized by law." Because the transfer was not authorized by law, it was *ultra vires.* And because it was *ultra vires,* Defendants are not protected by governmental immunity.

State defendants, on the other hand, focus on the general *activity* engaged in by the state or its officers, agents, or employees at the time the tort occurred.

> In the present case, the activity complained of in Count I of plaintiff's complaint was his confinement by the defendants in state mental institutions. The confinement of individuals in state institutions for the mentally disabled was, during the time of plaintiff's confinement, expressly authorized under the provisions of 1923 PA 151, the predecessor to the present Mental Health Code. Section 1 of that act (formerly MCL 330.11 [MSA 14.801]) provided that the Department of Mental Health and its predecessor agencies shall maintain

[20] We assume that plaintiff's allegations concerning the state's liability for false imprisonment are premised on theories of direct and vicarious liability. As enunciated in *Ross,* the tests for direct and vicarious liability share the governmental function standard.

certain institutions, including a state home and training school to be located at Lapeer, Michigan "for the humane, scientific, educational and economical treatment" of mentally handicapped persons, and a hospital at Traverse City, Michigan, for the "humane, scientific and economical treatment of mentally ill persons. . . ." The remaining sections of 1923 PA 151 went on to define in more detail the standards for commitment and care of individuals in state institutions.

There was, therefore, express legislative authorization for the defendants to operate institutions for the mentally disabled and to confine individuals in those institutions. That being the case, the operation of those institutions, including confining people therein, was a governmental function, and the immunity conferred by MCL 691.1407; MSA 3.996(107) clearly applies.

Ross indicates that state defendants have the better argument. First, this Court defined governmental function in that case as "an activity" authorized by law. Second, in discussing a governmental agency's vicarious liability, the Court, noted:

> Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the *activity* which the individual was engaged in at the time the tort was committed. [*Id.* at 625. Emphasis added.]

Third, although not dispositive, the Court's discussion of individual immunity later in the *Ross* opinion indicates that we defined governmental function in terms of the *general activity,* as opposed to the *specific conduct,* involved at the time the alleged tort occurred. In distinguishing individual immunity, where governmental function was not a criterion, we said:

> Therefore, to determine the existence and scope of the individual's immunity from tort liability in a particular situation, the *specific acts complained of, rather than the general nature of the activity,* must be examined. [*Id.* at 635. Emphasis added.]

Moreover, in applying the principles enunciated in *Ross* to the nine cases then before it, the Court focused on the activity, not the specific conduct, of the governmental defendants at the time the alleged torts occurred. See, e.g., *id.* at 638, 640-643, 645-647 (*Willis v Dep't of Social Services, Siener v Dep't of Mental Health,* and *Rocco v Dep't of Mental Health*).

Finally, in *Ross,* immediately after expounding our theory of vicarious liability, we cited *Sherbutte v Marine City,* 374 Mich 48, 50; 130 NW2d 920 (1964), asserting that a

> city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity. [*Ross, supra* at 625.]

Therefore, in *Ross,* we focused on the *general activity,* not the *specific conduct,* involved at the time the alleged tort occurred.

Moreover, the opinion of the federal district court in *Smith v Yono,* 613 F Supp 50, 53-54 (ED Mich, 1985), provides further support for the general activity standard. In *Smith,* in a suit against municipal defendants and individual police officers for torts committed during the course of an arrest, the court said:

> Plaintiff resists summary judgment in favor of the municipal defendants arguing that the *conduct* of the individual police officers was nongovernmen-

tal. Plaintiff's argument on this point is that the conduct of the officers in using excessive force during the arrest was nongovernmental and beyond the scope of immunity protection. This argument must fail, however, as a clear reading of the *Ross* opinion militates against such an analysis. In *Ross*, the Michigan Supreme Court focused upon the *activity* being engaged in at the time the tort was committed to determine the existence of a governmental function. "However, *if the activity* in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (i.e., the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the Governmental Immunity Act." *Ross v Consumers Power*, 420 Mich at 625; 363 NW2d 641 (emphasis supplied). Here, the activity being engaged in by the officers at the time the alleged torts were committed was the arrest of the plaintiff. Thus, as defendants were engaged in police activity at the time the tort was committed, the municipalities are protected by governmental immunity. As such, state law claims against the municipal defendants should be dismissed.

See also *Beasley v East Detroit Police Dep't*, 626 F Supp 1251 (ED Mich, 1986).

We think that to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature. As those justices in *Lockaby* indicated when they looked only to the tortious act, it would be difficult to envision a tortious act that is a governmental function. The Court of Appeals definition in *Smith* of a "justified act" as the criterion, runs into the same difficulty. Not only is it difficult to envision a justified act as tortious or a tortious act that is justified, but under that standard, a court would be focusing on the nature

of the conduct, rather than the function from which it arises.

On the other hand, a governmental body could intentionally embark on a tortious course of conduct which would abrogate the immunity of its activity, not because it is tortious, but because it is presumably unauthorized by law and, accordingly, not a governmental function. And, of course, a governmental body could be embarked on an activity not authorized by law that is not in and of itself tortious. If, in the course of carrying out such an activity, a tort was committed, even unintentionally, it would not be immune, because the general activity is not a governmental function.

In more specific terms, if in *Smith* it was the intent[21] of the defendant mental health department to confine plaintiff, knowing a court order could not be obtained, in order to accomplish illegally what it could not accomplish legally, the activity would be ultra vires and, therefore, a nongovernmental function and immunity would be lost. But if, in bypassing the legislatively prescribed procedure for plaintiff's commitment, it was not the intent of the defendant to confine someone who could not properly be confined, but rather the confinement was occasioned by time constraints or a desire to cut costs, it would still be within its governmental purpose, even if it resulted in someone being confined who would not have been confined had the correct procedure been followed. In the first instance, the purpose was to

[21] In the discussion accompanying this footnote, we deal only with the theory of direct liability.

As for the question what constitutes the "intent" of a governmental body, the issue has long befuddled the courts. We do not attempt to define here the elusive concept of organizational intent. For a general discussion of that problem, albeit in the context of constitutional torts, see Whitman, *Government responsibility for constitutional torts*, 85 Mich L R 225 (1986).

accomplish the commitment of one who was not intended to be committed under the governmental plan, whereas, in the second instance, the purpose was to be about the business of the agency, although there was an intent to cut corners.

The element of intent, then, is utilized under this standard not to distinguish the nature of the tort, but to distinguish a governmental function from a nongovernmental function.

We conclude this inquiry by finding that intentional torts are immune if committed within the scope of a governmental function; however, the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function.

In the case before us, Smith did allege the intentional failure to utilize the proper procedures, but he did not allege it was for a nongovernmental purpose. Plaintiff also alleged that it was for the purpose of confining him, but he did not and presumably could not allege that it was not within the scope of the defendant's authority to confine him under proper circumstances. He did not allege that the defendants were pursuing a nongovernmental purpose.

On this issue, the decision of the Court of Appeals should be reversed and the judgment of the Court of Claims granting defendants' motion for summary judgment, reinstated.[22]

[22] Mr. Smith also argues that applying the governmental immunity act to his case would render it unconstitutional. The constitutional issues raised by plaintiff, however, are spurious and without merit.

Plaintiff claims that the governmental immunity act violates his rights to due process of law and equal protection. He argues that, since the right to a remedy is fundamental, this Court should apply a strict scrutiny constitutional test, requiring a compelling state interest to sustain the statutory scheme.

Plaintiff's argument, however, fails for several reasons. First, the United States Supreme Court has *never* recognized the right to a remedy as a fundamental right. Plaintiff misuses this constitutional term of art. See Nowak, Rotunda & Young, Constitutional Law (3d ed), ch 11, § 11.7, pp 370-372.

Second, absent a fundamental right to a remedy, this Court need only apply a "rational basis" test, and the governmental immunity act is rationally related to *several* valid state purposes.

> [To begin with], imposition of liability on governmental agencies would bring about judgments requiring that tax moneys be diverted from the performance of governmental services, rendering those services less effective or totally unavailable.
>
> • • •
>
> [In addition], [g]overnmental agencies are . . . compelled to involve themselves in many activities that are inherently dangerous, absolutely essential, and have no chance of producing a profit.
>
> In many of these situations, the government does things which private individuals or corporations cannot or likely will not do . . . . By undertaking such peculiarly governmental functions, local governments expose themselves to substantial risk if not protected by governmental immunity.
>
> • • •
>
> [Moreover,] should the governmental immunity defense be eliminated, governmental agencies will cease to be interested in innovative programs which may better serve citizens and preserve the integrity of the governmental agency's public funds. [DeGrazia & Oldani, *Governmental Immunity—More: A call for legislative action*, 63 Mich B J 126, 129 (1984).]

It is apparent that the governmental immunity act furthers several quite legitimate governmental objectives.

Finally, the governmental immunity act, codifying as it does an historic principle of law, enjoys more than the customary presumption of constitutional validity. See *State Bar of Michigan v Lansing*, 361 Mich 185, 195; 105 NW2d 131 (1960).

V. MAY PLAINTIFFS RECOVER DAMAGES FOR CONSTITUTIONAL VIOLATIONS?

Finally, we consider whether an implicit right to sue for damages for violations of either the federal or state constitution exists. Both plaintiffs, as well as the amicus curiae, raise this issue, although all three expound different theories of recovery. Since neither Mr. Will's nor amicus curiae's argument is properly before us, we only address the substantive merits of Mr. Smith's claim for damages against the state on the basis of Michigan's 1908

Constitution. We decline to infer any right to sue the state for damages on the basis of violations of art 2, §§ 1 and 16 of the 1908 Constitution.

In *Bivens v Six Unknown Federal Narcotics Agents,* 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), on remand 456 F2d 1339 (CA 2, 1972), in a 5-1-3 decision, the Supreme Court, for the first time, found an implied right to sue federal officials in federal court for damages on the basis of violations of the federal constitution. The case involved a suit for damages instituted by Webster Bivens against federal narcotics officers on the basis of alleged violations of Mr. Bivens' Fourth Amendment rights. The federal district court dismissed the case on the ground that Mr. Bivens failed to state a cause of action, and the Court of Appeals for the Second Circuit affirmed. The United States Supreme Court reversed, holding that Mr. Bivens could recover monetary damages for any injuries resulting from the violation of his Fourth Amendment rights by federal narcotics officers.

The Court asserted that a damages remedy for injuries resulting from a violation of the Fourth Amendment by federal officials was not an especially "surprising proposition."

> Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." [*Bivens, supra* at 395-396. Citation omitted.]

The Court saw no reason to not conclude that Mr.

Bivens' complaint stated a cause of action under the Fourth Amendment for which he could recover monetary damage. Even though Congress had not acted to provide such a remedy, the *Bivens* case did not involve "special factors counselling hesitation," such as questions of federal fiscal policy, requiring greater caution on the part of the Court in inferring a private cause of action. Moreover, Congress had not explicitly prohibited private damage suits against federal officials for violations of the Fourth Amendment. Therefore, the Court concluded that Mr. Bivens could sue for and recover monetary damages for injuries sustained as a result of federal officials' violation of his Fourth Amendment rights.

In his concurring opinion, Justice Harlan agreed with the Court's decision to allow Mr. Bivens' recovery of monetary damages for the violation of his Fourth Amendment rights. Although Bivens made out a claim for damages, Justice Harlan noted that the appropriateness of money damages for other constitutionally protected interests might "well vary with the nature of the personal interest asserted." *Bivens, supra* at 408-409, n 9.

But three members of the Court, Chief Justice Burger and Justices Black and Blackmun, dissented. Although authoring separate opinions, all dissented on similar grounds: the Court should leave to Congress the creation of private causes of action under the constitution.[23]

> There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such

[23] See *Rethinking sovereign immunity after* Bivens, 57 NYU L R 597, n 4 (1982) (citations omitted) ("All three dissents in *Bivens* criticized the majority's holding as improper judicial usurpation of legislative powers").

> a federal cause of action against *state* officials acting under color of state law [(§ 1983)], it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action.[24] [*Bivens, supra* at 427-428 (Black, J., dissenting).]

Therefore, Justice Black viewed either the Congress or the state legislatures as the appropriate fora for resolving the complex policy questions involved in deciding whether to create a private cause of action for damages under the federal constitution.

In *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979), in a 5 to 4 decision, the Supreme Court extended the rationale of *Bivens*,

[24] In 1974, Congress amended the Federal Tort Claims Act to allow suit against the federal government for certain intentional torts committed by "investigative or law enforcement officers of the United States Government."

> The provisions of this chapter and section 1346(b) of this title . . . shall not apply to—
>
> • • •
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, *That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USC 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.* For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. [28 USC 2680(h). Emphasis added.]

recognizing an implicit right to sue federal officials for damages for violations of the Fifth Amendment's Due Process Clause. The case involved a lawsuit instituted by Shirley Davis against her employer, United States Congressman Otto E. Passman, for damages on the basis of sexual discrimination in violation of the Fifth Amendment. The Fifth Circuit Court of Appeals, sitting en banc, concluded that no cause of action under the Due Process Clause of the Fifth Amendment could be inferred to exist on the basis of the criteria established in *Cort v Ash*, 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975), for determining whether to infer a cause of action under a federal statute.[25] The Supreme Court reversed the Court of Appeals decision, holding that Ms. Davis had a cause of action under the Fifth Amendment and could recover money damages for any injuries resulting from the violation of her Fifth Amendment rights.

In its opinion, the Court distinguished between the concepts of "cause of action" and "relief" awarded.

> *[C]ause of action* is a question of whether a particular plaintiff is a member of the class of

[25] In *Cort v Ash, supra* at 78, the Supreme Court established four criteria for inferring a cause of action under a federal statute.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [Citations omitted.]

litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. [*Davis, supra* at 240, n 18.]

The Court first concluded that Ms. Davis had a cause of action under the Fifth Amendment. The Court asserted that the Court of Appeals erred in basing its analysis of a constitutional cause of action on the factors enunciated in *Cort v Ash* for determining whether to infer a cause of action under a federal *statute*. The Supreme Court noted that such a statutory inquiry differed fundamentally from an inquiry into whether to infer a cause of action under the federal constitution.

But though the Court recognized that Ms. Davis had a cause of action under the Fifth Amendment Due Process Clause, it still needed to address the propriety of awarding money damages. The Court provided four reasons for endorsing the notion of monetary awards for injuries resulting from violations of the Fifth Amendment Due Process Clause. First, absent an award of damages, Ms. Davis' injury would go unredressed. Since her case did not present complicated questions of valuation or causation, a court could easily determine an appropriate amount of damages to remedy the violation of her federal constitutional rights.

Second, unless the Speech and Debate Clause protected Congressman Passman's actions, the Court concluded that no "special factors counselling hesitation" precluded an award of damages.

Third, no congressional enactment prohibited persons in Ms. Davis' position from recovering monetary awards for the violation of their rights under the Fifth Amendment Due Process Clause. Absent explicit congressional language precluding persons in Ms. Davis' position from instituting

private damage suits in federal court, the Court concluded that Ms. Davis could pursue monetary relief for Congressman Passman's unconstitutional federal employment discrimination.

Fourth, the Court did not seem exceedingly concerned that recognition of an implicit right to sue for damages pursuant to the Fifth Amendment Due Process Clause would deluge the federal courts with claims.[26] But even recognizing the possibility of such a problem, the Court concluded that this did not warrant automatic preclusion of a damages remedy. In short, the Court saw no reason to not allow recovery of damages in a federal court suit for violations of Ms. Davis' rights under the Due Process Clause of the Fifth Amendment.

Then in *Carlson v Green*, 446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980), in a 5-2-2 decision, the Supreme Court recognized an implicit right to sue

[26] Approximately 75 percent of *Bivens* actions involve multiple defendants. Although no governmentwide statistics document the incidence of filings of *Bivens* suits, the available data indicate a steady increase. Between 7,500 and 10,000 *Bivens* suits against government employees [were brought between 1971 and 1981]; at least 600 individual FBI agents have [been] [sic] named defendants in these cases. The Torts Branch of the Department of Justice's Civil Division records filings of *Bivens* cases against individual employees for the three years 1979-81 as follows: 1979, 535; 1980, 547; 1981, 601. The percentage of *Bivens* cases within the overall Torts Branch case load increased to 9 percent of the total in 1979, to 16 percent in 1980, and to 18 percent in 1981. These percentages, obtained from only one branch of the Civil Division, do not include actions that other Justice Department units, such as the Civil Rights Division, handle, nor do they include similar cases litigated by independent agencies that defend their own *Bivens* defendants, such as the Securities and Exchange Commission. The Justice Department estimates that approximately 2,200 *Bivens* suits, against an average of 3-5 federal employees, were pending as of March 31, 1981. According to testimony given in March 1982, the "annualized cost" of the present case load is running at $15,821,000, plus payment to private counsel by the department of about $500,000 per year. [Schuck, Suing Government (New Haven: Yale University Press, 1983), Appendix, p 202.]

for damages under the Eighth Amendment, despite the presence of a statutory cause of action under the Federal Tort Claims Act (FTCA), 28 USC 2671. In *Carlson*, the mother of Joseph Jones, instituted suit against federal prison officials claiming that their inattention to, and inadequate treatment of, Mr. Jones' asthma condition caused his death, thus violating his Eighth Amendment rights.

The Court began its analysis with a recapitulation of the principles enunciated in *Bivens, supra*.

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective. [*Carlson, supra* at 18-19.]

But, no special factors, such as the Court's reluctance to intrude upon activities accorded constitutional status, indicated that the Court should move with caution in recognizing an implicit right to sue for damages under the Eighth Amendment. After all, the federal officials involved did not enjoy the protection of constitutional provisions such as the Speech and Debate Clause as alleged in *Davis, supra*. Moreover, the qualified immunity accorded such officials in *Butz v Economou*, 438 US 478; 98 S Ct 2894; 57 L Ed 2d 895 (1978), on remand 466 F Supp 1351 (SD NY, 1979), provided sufficient protection to prevent officials from feeling inhibited in the discharge of their duties.

In addition, although Ms. Green could sue for damages for her son's death pursuant to the FTCA, nothing in the statutory language or the legislative history of the act indicated an intent on the part of Congress to make the FTCA an exclusive remedy. The Court focused its inquiry on whether Congress intended the FTCA to replace, rather than complement, a *Bivens* remedy. The Court concluded that Congress intended the FTCA and *Bivens* to serve as "parallel, complementary causes of action."

Moreover, the Court noted four additional factors, suggesting that a *Bivens* action was a more effective remedy than a suit pursuant to the FTCA. The Court found that these factors further supported its conclusion that Congress did not intend to limit persons like Ms. Green to relief under the FTCA. First, since a *Bivens* action operated against individual federal officials and not the federal government as an entity, it effectively deterred tortious activity. After all, the threat of individual liability provided a greater incentive to individual officials to act responsibly. Second, while the FTCA prohibited an award of punitive damages, the case law suggested that an aggrieved plaintiff could recover punitive damages in a *Bivens* action. Third, in a *Bivens* action, an aggrieved plaintiff could request a trial by jury, but could not do so when suing under the FTCA. Finally, under the FTCA, liability of the United States turned on the laws of the *state* in which the tortious activity occurred.[27] The *Bivens* action labored under no

[27] [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of

such restriction. As a result, recognition of a *Bivens* action for Eighth Amendment violations actually promoted a more uniform system of liability for federal officials. Therefore, the Court concluded that the

> FTCA [was] not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate [the Court could not] hold that Congress relegated [Ms. Green] exclusively to the FTCA remedy. [*Carlson, supra* at 23.]

In a lengthy critique of the *Bivens* decision, Justice Rehnquist dissented from the Court's opinion in *Carlson*. He argued that the constitution did not confer on the judiciary the power to create private damage remedies under specific constitutional provisions and prohibitions; only the legislature possessed that authority.

> [I]t is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly. For example, in 42 USC § 1983, Congress explicitly provided for federal courts to award damages against state officials who violate an individual's constitutional rights. With respect to federal officials, however, it has never provided for these types of damages awards. Rather, it chose a different route in 1974 by eliminating the immunity of federal officials under the FTCA. [*Carlson, supra* at 40-41.]

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civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in *accordance with the law of the place where the act or omission occurred.* [28 USC 1346(b). Emphasis added.]

See n 24. Therefore, according to Justice Rehnquist, absent congressional authorization, the courts could not award monetary relief to plaintiffs aggrieved by violations of their federal constitutional rights.

But in two cases, decided in 1983, *Chappell v Wallace*, 462 US 296; 103 S Ct 2362; 76 L Ed 2d 586 (1983), and *Bush v Lucas*, 462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983), the Supreme Court apparently curtailed the scope of its earlier opinions in *Bivens*, *Davis*, and *Carlson*.

> In these two newest cases, *Chappell v Wallace* and *Bush v Lucas*, the Supreme Court substantially raised the barriers to federal court recognition of certain causes of action for money damages arising directly under the Constitution. The Court did so without acknowledging that this was the purpose or effect of its line of reasoning, and without proffering any cogent explanation or justification for this change in the law. [Steinman, *Backing off* Bivens *and the ramifications of this retreat for the vindication of First Amendment rights*, 83 Mich L R 269 (1984).]

Chappell involved Navy enlisted men who instituted a suit for damages against certain of their commanding officers for alleged racial discrimination in violation of rights guaranteed under the federal constitution. The Court rested its decision not to create a *Bivens*-style remedy on the presence of two "special factors counselling hesitation." First, the Court called attention to the unique relationship between a soldier and his commanding officer and the distinctive demands of military discipline. Second, the Court took note of US Const, art I, § 8, explicitly granting Congress plenary authority over the military, and Congress' exercise of that authority in establishing a "com-

prehensive internal system of justice to regulate military life." The Court concluded that, taken together, these two factors made it "inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell, supra* at 302, 304 (citation omitted).

But the Court's discussion of the second factor counselling hesitation indicated a retreat from the broad remedial scope of its earlier opinions in *Bivens, Davis,* and *Carlson*. See Steinman, *supra* at 285-291; see also Note, *Two approaches to determine whether an implied cause of action under the constitution is necessary: The changing scope of the* Bivens *action,* 19 Ga L R 683 (1985) (hereinafter cited as *Two approaches*). To begin with, the Court noted that Congress provided aggrieved military personnel with relief alternative to a *Bivens*-style remedy. But, in examining the congressional remedies provided, the Court failed to apply *Carlson*'s test of an equally effective alternative remedy explicitly created by Congress as a substitute for *Bivens* relief. Moreover, in both *Bivens* and *Carlson,* the Court indicated that the provision of an "equally effective alternative remedy" and "special factors counselling hesitation" served as two distinct reasons for not creating a *Bivens*-style remedy. In *Chappell,* the Court used the existence of alternative remedies as a special factor counselling hesitation, thus blurring the distinction between the two.

> Although it is unclear what special factors counsel hesitation, it should at least be clear that the existence of a legislative remedial scheme is not one such factor—for the existence of such legislation is the subject of the one other situation expressly postulated as defeating the implication of a *Bivens* remedy. In *Carlson,* the Court had specified just what sort of congressional action would defeat

> a *Bivens* claim. Not any relevant legislation would do, only legislation providing a cause of action that is explicitly declared to be a substitute for, and in Congress' view is as effective as, a *Bivens* remedy. In *Chappell,* the Court retreated from the promise of *Bivens* and its progeny by failing to require of Congress what it had repeatedly indicated it would require before a *Bivens* claim would be defeated on the basis of congressional action. The Court utterly failed to acknowledge or defend this retreat. [Steinman, *supra* at 290.]

Thus, without acknowledging it, the Court, in *Chappell,* made the inference of a *Bivens*-style remedy more difficult. See *Two approaches, supra* at 685-686.

The Court continued this "trend" in *Bush.* In *Bush,* a NASA aerospace engineer sued the director of the space center at which he was employed for damages on the basis of alleged violations of his First Amendment rights. Despite the fact that Congress provided a "less than complete remedy" for the wrong suffered, the Court declined to create a *Bivens*-style remedy for Mr. Bush.

The Court seemed to give special deference to Congress' ability to balance the policy considerations relevant to a determination of whether to create a remedy for a harm suffered. The Court noted that Congress had carefully balanced the conflicting policy considerations in creating an elaborate and comprehensive set of remedies for those persons in the federal civil service like Mr. Bush. The Court found that the question whether to augment a remedial scheme carefully constructed by Congress did not turn merely on a determination that existing remedies failed to provide complete relief. Instead, the Court asserted that the decision to create a *Bivens*-style remedy in these circumstances hinged on a careful evalua-

tion of the relevant policy considerations. In the end, the Court deferred to Congress' superior expertise,

> convinced that Congress [was] in a better position to decide whether or not the public interest would be served by creating [a *Bivens*-style remedy in this case]. [*Bush, supra* at 390.]

As in *Chappell,* the Court in *Bush* apparently retreated from the broad remedial stance taken in the earlier *Bivens, Davis,* and *Carlson* cases. To begin with, the Court once again failed to examine the civil service remedial scheme in *Bush* in light of *Carlson*'s test of an "equally effective alternative remedy." Moreover, the Court seemed to avoid the question whether it should create a right to sue for damages, by claiming that Congress possessed superior expertise in balancing the policy considerations relevant to the decision whether to create a *Bivens*-style remedy.

> *Bush* is troublesome because the Court seems to have abdicated its responsibility to decide whether a remedy should be implied [sic] from the first amendment under the circumstances presented. It said that that decision should be made in light of a broad range of policy considerations and any special factors counselling hesitation. But in the very course of deciding *whether* Congress' role in federal personnel matters constituted such a "special factor," the Court seemed, unconsciously, to shift its attention to whether a damage remedy should exist. It decided that Congress was better able than a court to decide that question. If so here, why not always, given Congress' ubiquitous ability to inform itself through fact-finding procedures not available to the courts? What has become of the once clearly discernible message of the Constitution that the judiciary should be the primary means through which constitutional rights are

> enforced? In its ostensibly "conservative" desire to defer to Congress on all remedial matters, the Court abdicated its responsibility. [Steinman, *supra* at 295-296. Emphasis in original.]

Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens, Davis,* and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the Court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution.

A. SMITH

Plaintiff Smith argues that we should create a *Bivens*-style remedy for violations by state entities of the equal protection and due process clauses of Michigan's 1908 Constitution.[25] Although Mr. Smith preserved this issue for appeal, we decline to recognize such a remedy for the violation of these provisions of the 1908 Constitution.

Mr. Smith claims that state defendants violated his constitutional rights under both state constitutions spanning his nearly fifty-year confinement, including but not limited to art 2, §§ 1 and 16 of the 1908 Constitution. Article 2, § 1 provided:

> All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Article 2, § 16 provided as follows:

> No person shall be compelled in any criminal

[25] Since we decline to infer a right to sue for damages on the basis of the state constitution by state agencies, we need not reach the question, argued before this Court, whether governmental immunity bars a claim for recovery on the basis of a "constitutional tort."

> case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

We deal here only with plaintiff's claims for damages on the basis of violations of Const 1908, art 2, §§ 1 and 16.[29] Plaintiff avers in his complaint, the violation of constitutional rights, including, *but not limited to,* art 2, §§ 1 and 16. But he provides this Court with no indication of what other rights the state violated, besides his right to equal protection and due process of the law, which art 2, §§ 1 and 16, respectively, guarantee.

Since plaintiff specifically pled the violation of art 2, §§ 1 and 16 of the 1908 Constitution, we only address the question whether to infer a right to sue for damages from these two state constitutional provisions. See n 29.

Plaintiff argues that Michigan has long recognized the propriety of awarding damages for a violation of the Taking Clause of the state constitution. Although he acknowledges that the Taking Clause, Const 1963, art 10, § 2; Const 1908, art 13, §§ 1-5, expressly provides for damages, plaintiff argues that the logic of the Supreme Court's decision in *Bivens* warrants recognition of an implicit right to recover damages for the violation of state constitutional rights by state agencies. We disagree.

First, neither the United States Supreme Court nor the Sixth Circuit Court of Appeals has expressly recognized a right to recover damages for constitutional violations by *state agencies.* In *Bivens, Davis,* and *Carlson,* the Supreme Court recognized an implicit cause of action for violations of

[29] Neither party discusses whether the 1908 or the 1963 Michigan Constitution properly applies to the facts of *Smith.* We base our analysis on plaintiff's specific allegations of violations of the 1908 Constitution.

the federal constitution by *federal officials,* not federal or state governmental agencies. In addition, although the Sixth Circuit has recognized a *Bivens*-style remedy for violations by federal officials of a plaintiff's First Amendment rights, *Yiamouyiannis v Chemical Abstracts Service,* 521 F2d 1392 (CA 6, 1975), later app 578 F2d 164 (CA 6, 1978), cert den 439 US 983 (1978), and Fifth Amendment rights, *Hall v United States,* 704 F2d 246 (CA 6, 1983), cert den 464 US 1002 (1983), the Court of Appeals has never expressly extended the logic of the *Bivens* line of cases to allow the recovery of damages from *state agencies* for violations of a plaintiff's constitutional rights.[30]

Moreover, the Supreme Court has never extended the reasoning of *Bivens* to violations of the Fourteenth Amendment, and, as Justice Harlan noted in his concurrence in *Bivens,* the appropriateness of money damages for other types of constitutionally protected interests might "well vary with the nature of the personal interest asserted." We note that the rights asserted by plaintiff are very similar to those protected by the Fourteenth Amendment.

> [After all,] [t]his Court has held numerous times that the Michigan Const 1908, art 2, § 1, secures the same right of equal protection as does its counterpart in the Constitution of the United

[30] In *Wright v Tennessee,* 628 F2d 949, 951 (CA 6, 1980), the Court of Appeals dismissed plaintiff's "independent constitutional claims" on jurisdictional grounds, assuming, without deciding, that a *Bivens*-style remedy for violations of the Fourteenth Amendment by the state existed.

> Assuming the existence of a *Bivens* . . . type cause of action for Fourteenth Amendment violations, the complaint in the present case did not set forth a jurisdictional basis for such a claim. [Citation omitted.]

See also *Rowe v Tennessee,* 609 F2d 259, 262 (CA 6, 1979).

> States. *Gauthier v Campbell, Wyant & Cannon Foundry Co,* 360 Mich 510, 514 [104 NW2d 182 (1960)] and cases therein cited. [*Fox v Employment Security Comm,* 379 Mich 579, 588; 153 NW2d 644 (1967).]

See also *Baldwin v North Shore Estates Ass'n,* 384 Mich 42, 50-51; 179 NW2d 398 (1970).

The Supreme Court's analysis of whether to recognize a *Bivens*-style remedy for violations of the Fourteenth Amendment proves persuasive in our disposition of whether to recognize a right to recover damages for violations of Const 1908, art 2, § 1. The question whether to recognize a *Bivens*-style remedy for violations of the Fourteenth Amendment of the federal constitution confronted the Supreme Court in *Mt Healthy Bd of Ed v Doyle,* 429 US 274; 97 S Ct 568; 50 L Ed 2d 471 (1977). Although presented with this issue in *Mt Healthy,* a pre-*Monell* decision, the Court left unanswered the question whether to infer a right to sue for damages for violations of the Fourteenth Amendment by a municipal school board.

> The question of whether the Board's arguments [that the federal court lacked jurisdiction of Mr. Doyle's claim pursuant to 28 USC 1331 because the board was not a "person" for purposes of § 1983] should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens* . . . imply [sic] a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent. [*Mt Healthy, supra* at 278. Citation omitted.]

Therefore, the Supreme Court's hesitation to recognize a *Bivens*-style remedy for violations of the Fourteenth Amendment of the federal constitution suggests caution in recognizing such a novel theory of recovery in our jurisprudence.

Second, allowing suits for damages against state agencies for violations of the state constitution does not further the goal of deterrence underlying a *Bivens*-style action. In *Carlson, supra,* the Supreme Court noted that a *Bivens* remedy not only compensated victims, but also acted as a deterrent to unconstitutional activity by federal officials. See *ante,* p 620. However, making governmental bodies, as opposed to individual officials, liable for damages for constitutional violations lessens the deterrent effect of a *Bivens*-style remedy.

> Shifting liability to the government, or some unit thereof, might well increase the chances of actual recovery by a plaintiff who won a judgment, as the United States is much less likely to be judgment-proof than is an individual. But it is by no means certain that the goal of deterring violations of constitutional rights would be better served by such a shift. The notion that deterrence would be promoted by the shift to government liability is counterintuitive. See, e.g., *Carlson v Green,* 446 US 14, 21 (1980). Moreover, many factors other than a government unit's vulnerability to money judgments for the unconstitutional activities of its agents affect how well the unit will train its personnel to respect the constitutional rights of its own members and of the public it serves. See, e.g., P. Schuck, [Suing Government (New Haven: Yale University Press, 1983)], at 105-08. And there are influences on individual agents other than the values inculcated by the agencies that employ them. Nor is it certain that vigorous decisionmaking, of a desirable sort, would be enhanced by a shift of liability to the government. A government agency's self-protective tendencies could cause it to inculcate a cautiousness that

would be worse than the individually evolved self-protective tendencies which concern Schuck. New or different sanctions available against individual officials could keep them timid. Even if decision-making were to be invigorated by a shift to government liability, that might well occur only at the cost of increased and increasingly serious violations of constitutional rights. Still another factor is that the shift to governmental liability would frustrate whatever desire victims have for personalized retribution. [Steinman, *supra* at 280-281, n 69.]

Third, the *Bivens* line of cases indicates a balance between the competing values of fully compensating victims for violations of their constitutional rights and deferring to the policymaking expertise of the legislative branch. The Supreme Court's most recent decisions in *Chappell* and *Bush*, however, indicate a shift towards greater deference to the Legislature's ability to balance conflicting policy considerations. See *Two approaches, supra* at 686. Moreover, the Court has apparently abandoned its stringent "equally effective alternative remedy" test from *Carlson*, allowing courts to consider the existence of alternative remedies as "special factors counselling hesitation." See *ante*, p 623. In essence, the Court has made the recognition of *Bivens*-style remedies more difficult while showing greater deference to the policymaking expertise of the Legislature.

Finally, the unusual factual circumstances of this case suggest consideration of the "special factors counselling hesitation" factor. To begin with, although the 1908 Constitution no longer exists, plaintiff wants us to create, in essence, a special remedy effectively applicable only to the facts of his case. Moreover, those sections of the 1963 Constitution, comparable to the provisions of

the 1908 Constitution under which plaintiff sued, indicate that we should defer to the Legislature the question whether to create a damages remedy for violations of a plaintiff's rights to due process or equal protection. For example, the Equal Protection Clause of the 1963 Constitution (art 1, § 2) leaves its implementation to the Legislature.

> [Under art 1, § 2] the legislature is empowered to create and define the "civil rights" that it feels are deserving of protection. The nature and scope of these rights, *and the remedies available* for their violation, are left to legislative judgment. [Cramton, *The powers of the Michigan Civil Rights Commission*, 63 Mich L R 5, 13 (1964). Emphasis added.]

Thus, the Equal Protection Clause of the 1963 Constitution requires the Legislature to create the rights and remedies available under Const 1963, art 1, § 2.

Thus, for this Court to accept the plaintiff's invitation to adopt and even extend the *Bivens* rationale, for one person on the basis of a constitution no longer in existence, would not be prudent. We decline to create such a novel remedy as the right to sue the state for damages for violations of the state constitution. We defer to the Legislature's unique capacity to weigh the competing policy considerations implicated in creating such a damages remedy.[31] Therefore, we would reverse the Court of Appeals affirmance of the Court of Claims denial of defendants' motion for summary judgment on plaintiff's Michigan constitutional claim.

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[31] We do not reach the substantive merits of plaintiff's claims that state defendants allegedly violated his rights to due process and equal protection of the laws pursuant to Const 1908, art 2, §§ 1 and 16.

B. WILL

Next, Mr. Will argues that we should award him damages for the violation, by the Department of State Police, of the following rights under the Michigan Constitution: (1) the right to promotion based on merit, art 11, § 5; (2) the right to the equal protection of the laws, art 1, § 2; and (3) the right to due process of law, art 1, § 17. Mr. Will, however, bases his theory of recovery not on an analogy to the *Bivens* line of cases, but on the existence of a "cumulative judicial remedy"[32] to recover compensation for civil rights violations. We do not consider the merits of Mr. Will's argument, however, because he failed to preserve his claim for appeal. Thus, his Michigan constitutional claim is not properly before us.[33]

In order to understand the lack of preservation, a brief recapitulation of the procedural history is necessary. Plaintiff's January, 1978, complaint in Ingham Circuit Court consisted of the following three counts: (1) count I, alleging, inter alia, denial of due process of law as a result of the Civil Service Commission denying plaintiff a grievance hearing, (2) count II, asserting a claim pursuant to § 1983, and (3) count III, asserting a claim for

[32] See *Pompey v General Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971), and *Holmes v Haughton Elevator Co*, 404 Mich 36; 272 NW2d 550 (1978).

[33] Amicus curiae, American Civil Liberties Union Fund, argues that in *Will*, we should recognize a *Bivens*-style cause of action against state agencies and officials for violations of the Fourteenth Amendment of the federal constitution. But amicus curiae's argument is not properly before us. As state defendants aptly note:

> Amicus seeks to raise this issue [of an independent cause of action directly under the federal constitution] . . ., although this issue was never once mentioned by the Court of Claims or the Court of Appeals, and was never once mentioned by Plaintiff & Cross-Appellant in the Court of Claims or in the Court of Appeals, or in this Court.

damages on the basis of alleged violations of the Michigan Constitution. In June of 1978, the Ingham Circuit Court remanded Mr. Will's case to the CSC for a fourth-step grievance hearing. The circuit court retained jurisdiction to hear any appeals from the administrative hearing decision. Then, in November of 1978, plaintiff filed a complaint in the Court of Claims. That complaint consisted of the following two counts: (1) count I, asserting a claim pursuant to § 1983 (count II in the Ingham Circuit Court), and (2) count II, asserting a claim for damages pursuant to the Michigan Constitution (count III in the Ingham Circuit Court).

In an opinion dated May 7, 1979, the Court of Claims dismissed plaintiff's Michigan constitutional claim, stating that plaintiff had not exhausted his administrative remedies and that plaintiff could appeal in the Ingham Circuit Court at the conclusion of the administrative proceedings; that dismissal was not appealed. Therefore, when the Court of Claims, in the same opinion, granted plaintiff's motion to consolidate the Ingham Circuit Court and Court of Claims actions, only plaintiff's § 1983 claims were consolidated. In June of 1980, the grievance hearing officer ruled in plaintiff's favor, finding a violation of Const 1963, art 11, § 5, and the CSC affirmed the decision. Since plaintiff never appealed this decision in the Ingham Circuit Court, and neither appealed the Court of Claims dismissal of his Michigan constitutional claim nor sought reinstatement of that claim, his claim for relief on the basis of the Michigan Constitution expired.

As state defendants aptly note:

> Mr. Will argues that the Court of Claims and the Court of Appeals should have found that the state was liable for violations of Const 1963, art 1,

§§ 2 and 17, and art 11, § 5. Mr. Will made these allegations in his original Court of Claims Count II that was dismissed on July 10, 1979. Mr. Will never once moved under GCR 1963, 118.3 to amend to conform to the "proofs." Nor did Mr. Will ever seek to have the Court of Claims reinstate his original Count II. Nor did Mr. Will ever seek leave to appeal the dismissal of his original Count II in the Court of Claims. Nor did Mr. Will ever appeal by right the dismissal of his original Count II in the Court of Claims.

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Mr. Will argues that because he made an argument to the Circuit Court in relation to Circuit Court Count III concerning an alleged deprivation of rights under the Michigan Constitution, the Circuit Court argument automatically applied to Count II of the Court of Claims Complaint that had been dismissed two years earlier, and for which Mr. Will never made any motion to reinstate.

Mr. Will never appealed the Final Judgment of the Circuit Court to the Court of Appeals, and Circuit Court matters are not before this Supreme Court.

Both the Court of Claims opinion of May 7, 1979, and the subsequent order of July 11, 1979, informed plaintiff that the Court had dismissed his claim on the basis of the Michigan Constitution and that any appeal lay with the circuit court at the conclusion of the administrative proceedings then pending.

Plaintiff has not yet exhausted his administrative remedies. A grievance proceeding has been ordered and is in the process of being organized. At the conclusion of the administrative proceedings, plaintiff may appeal to the Circuit Court of Ingham County. An action at this time in the Court of Claims is improper and accelerated judg-

ment as to Count II [Michigan constitutional claim] is hereby granted.

Obviously, when the Court in the same May 7, 1979, opinion granted plaintiff's motion to consolidate the Circuit Court and Court of Claims actions, the understanding was that only the plaintiff's § 1983 claims remained for consolidation. A subsequent opinion of the Court of Claims made clear this understanding.[34]

In conclusion, we find that Will failed to preserve his constitutional claim for appeal.[35]

[34] Contrary to Plaintiff's argument, Count II of the Court of Claims action, which set forth an independent allegation of a violation of the Michigan constitution, was dismissed pursuant to a motion for accelerated judgment under GCR 1963, 116.1(2). This Count was dismissed because Plaintiff failed to exhaust his administrative remedies and because the Court of Claims lacked jurisdiction of the subject matter which, upon completion of administrative remedies, belonged in the Circuit Court.

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Plaintiff's right to redress for Defendant's failure to follow merit as the basis for promotions in civil service positions in violation of the Michigan constitutional provision under art XI, § 5 is to follow the grievance procedure established by the Civil Service Commission. After exhausting all administrative remedies the proper approach is to seek review in the Circuit Court. See *Viculin v Dep't of Civil Service*, 386 Mich 375, 393; 192 NW2d 449 (1971).

In the Circuit Court matter the Civil Service Commission affirmed the hearing Officer's finding that the Department of State Police used "partisan considerations" of Plaintiff's brother's political activities in violation of Michigan Constitution and affirmed the measure of damages in the amount of $201.60 in favor of Plaintiff. Plaintiff's failure to seek judicial review of this determination renders the Civil Service Commission's decision final. This obviates the necessity for this Court to review the matter on the basis of liability for civil damages for the alleged violations of the Michigan Constitution.

[35] We neither approve nor disapprove the reasoning of the Court of Claims May 7, 1979, opinion in which the court dismissed plaintiff's Michigan constitutional claim. Instead, we merely conclude that plaintiff did not preserve his constitutional claim for appeal by failing, for example, to appeal the Court of Claims dismissal of his Michigan constitutional claim or to seek reinstatement of that claim.

VI. CONCLUSION

First, we would hold that the term "person" under § 1983 does not include states. Thus, we would affirm the decision of the Court of Appeals in *Will,* and reverse the decision of the Court of Appeals in *Smith.*

Second, we would hold that a state official, sued in his official capacity for retroactive relief, is not a person for purposes of suit under § 1983. Thus, we would reverse the decision of the Court of Appeals in *Will* on this issue.

Third, we would hold that no intentional tort exception to the governmental immunity act exists, and that an intentional tort arising out of a governmental function is immune. Thus, we would reverse the decision of the Court of Appeals in *Smith* and reinstate the Court of Claims grant of defendants' motion for summary judgment.

Finally, we would find that there is no implicit right to sue the state for damages on the basis of violations of Const 1908, art 2, §§ 1 and 16 of the Michigan Constitution. Thus, in *Smith,* we would reverse the Court of Appeals affirmance of the Court of Claims denial of defendants' motion for summary judgment on this issue.

RILEY, C.J., concurred with BRICKLEY, J.

BOYLE, J. (*concurring in part and dissenting in part*). We concur with Justice BRICKLEY's conclusion that the state is not a "person" for purposes of 42 USC 1983, that a state officer sued in an official capacity is not a "person" for purposes of a damage suit under 42 USC 1983, that the allegation of a common-law intentional tort does not avoid statutory immunity per se, and that Mr. Will's damage claim under the Michigan Constitution has been waived. However, we write separately to state our view that an allegation of a state constitutional tort[1] perpetrated by virtue of a state custom or policy avoids the strictures of statutory governmental immunity. We would remand *Smith v Dep't of Public Health* to the Court of Claims for further proceedings.

I

Since this case involves appeals of rulings on summary judgment motions, the factual record is necessarily sparse. However, the basic contours of the factual background follow.

On February 12, 1925, Jack Smith was born in the Traverse City State Mental Hospital, to which his mother had been committed two days earlier. Mrs. Smith died a few hours after Jack Smith's birth. In June, 1925, Jack was transferred to the state orphanage in Coldwater, the Coldwater State Public School. In September, 1926, when Jack was about nineteen months old, the superintendent of the orphanage decided that Jack was "feeble-minded" and sought Jack's transfer to an institution for the retarded, the Michigan Home and Training School in Lapeer. This transfer was made in November, 1926, without a court order authorizing Jack's commitment to the Lapeer institution. One of plaintiff's allegations is that Jack was in fact of normal intelligence at the time of this allegedly invalid commitment.

During the next eleven years, Jack Smith lived at the Michigan Home in Lapeer. In October of 1937, Jack Smith was formally committed to the Lapeer institution. He remained at the Michigan Home in Lapeer until 1964, when he was diag-

[1] This opinion deals solely with allegations of violations of the state constitution.

nosed as a paranoid schizophrenic and transferred to the Traverse City State Hospital, the place of his birth. He remained in the mental hospital for nine years, until his release in May, 1973. He lived in foster care homes from 1973 until his death in February, 1984, during the pendency of this litigation.

Count III of plaintiff's Court of Claims complaint alleges that Jack Smith was not retarded at birth, but that he became retarded as a result of his improper or illegal institutionalization as a young child. Plaintiff's amended complaint also alleges an equal protection violation under the 1908 Constitution.

The defendant moved for summary judgment on the basis that the state is immune from liability for plaintiff's injuries. The Court of Claims found governmental immunity inapplicable to the constitutional tort allegations of count III. We agree and would remand count III to the Court of Claims for further proceedings.

II

MCL 691.1407; MSA 3.996(107) provides:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

The plaintiff argues that this statute does not immunize the state from liability for its unconstitutional acts; the defendant counters that plaintiff

has merely alleged torts, not constitutional violations, and that MCL 691.1407; MSA 3.996(107) clearly covers tortious behavior. Defendant fails to argue that, assuming a constitutional violation has been alleged, statutory immunity bars recovery.

Assuming the plaintiff proves an unconstitutional act by the state which is otherwise appropriate for a damage remedy, the question which confronts this Court is whether sovereign or governmental immunity shields the state from liability for damages for its alleged acts which violate our state constitution. We would hold that neither common-law sovereign immunity nor the governmental immunity found in MCL 691.1407; MSA 3.996(107) bars recovery.

In our constitutional form of government, the sovereign power is in the people, and "[a] Constitution is made for the people and by the people." *Michigan Farm Bureau v Secretary of State*, 379 Mich 387, 391; 151 NW2d 797 (1967) (quoting Cooley, Constitutional Limitations [6th ed], p 81). The Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount. See, generally, *Dearborn Twp v Dearborn Twp Clerk*, 334 Mich 673, 688; 55 NW2d 201 (1952). It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform. All state public officers, legislative, executive, and judicial, are required by Const 1963, art 11, § 1, to swear or affirm to support that same document.[2]

[2] Art 11, § 1 provides:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of mmake one and one-

In light of the preëminence of the constitution, statutes which conflict with it must fall. A basic rule of constitutional interpretation is that "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City School Dist v Attorney General,* 384 Mich 390, 406; 185 NW2d 9 (1971). Thus, interpretations which avoid confrontations between statutes and the constitution are generally favored.

MCL 691.1407; MSA 3.996(107) does not, by its terms, declare immunity for unconstitutional acts by the state. The idea that our Legislature would indirectly seek to "approve" acts by the state which violate the state constitution by cloaking such behavior with statutory immunity is too farfetched to infer from the language of MCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature.

Neither does common-law sovereign immunity immunize the state from liability for its alleged unconstitutional acts. This Court abrogated common-law sovereign immunity in *Pittman v City of Taylor,* 398 Mich 41; 247 NW2d 512 (1976). Even absent such general abrogation, however, we would decline to apply sovereign immunity to violations by the state of our state constitution. The curious doctrine of sovereign immunity in America, subject to great criticism over the years, see, generally, Jaffe, *Suits against governments and officers: Sovereign immunity,* 77 Harv L R 1 (1963), should, as a matter of public policy, lose its vitality when faced with unconstitutional acts of the state. The primacy of the state constitution

half inches of underscoringx according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

would perforce eclipse the vitality of a claim of common-law sovereign immunity in a state court action for damages.

Tort claims against government can, however, be premised on two separate theories: direct liability from the agency's own acts, or vicarious liability for the acts of its employees, officers, and agents. See *Ross v Consumers Power (On Rehearing),* 420 Mich 567, 621-625; 363 NW2d 641 (1984). In *Ross,* p 624, we noted that *"[r]espondeat superior* liability generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority."[3] For "constitutional torts," liability should only be imposed on the state in cases where a state "custom or policy" mandated the official or the employee's actions. *Ross* held that the general effect of statutory immunity was to ban vicarious governmental liability for the acts of agents, officers, and employees. Those policy reasons which restrain us from reading MCL 691.1407; MSA 3.996(107) to immunize the state for its direct violations of the constitution do not also require imposing vicarious liability for acts of state officers, employees, or agents which violate the state constitution.

The state's liability should be limited to those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the 42 USC 1983 standard for local governments articulated in *Monell v New York City Dep't of Social Services,* 436 US 658; 98 S Ct 2018; 56 L Ed

[3] *Ross* held that vicarious liability can only be imposed on governmental agencies "when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity that is nongovernmental or proprietary, or which falls within a statutory exception." *Ross, supra,* p 625. In *Ross,* of course, the question of constitutional torts was not present.

2d 611 (1978). Liability should be imposed on the state only where the action of a state agent "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [or] governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.*, pp 690-691. Thus, statutory immunity would continue to bar suit for cases in which the only possible liability of the state is based upon respondeat superior. Cf. *id.*, 691-694.

A limitation of the state's liability to situations in which the injury occurs as the result of a custom or policy of the state is dictated by prudential concerns. First, the public policy concerns which militate a remedy are greatest when the state has such "primary governmental liability." Compare Note, *Rethinking sovereign immunity after* Bivens, 57 NYU L R 597, 637 (1982) (advocating abolition of the sovereign immunity of the United States for constitutional torts). This standard avoids the spectre of multitudinous lawsuits against the state for the unauthorized tortious acts of employees. Such a cause of action also is "more manageable: causation is more easily proven and the locus of liability is more readily ascertained." *Id.* It also serves the objective of deterring future similar unconstitutional acts while still providing compensation for the injured party. *Id.*

In a case involving an alleged unconstitutional act by the state government, neither sovereign nor statutory immunity should bar liability. The injury arises from violation of a constitutionally protected right by the government, a right engendered by "the basic law which created and seeks to control that government." Dellinger, *Of rights and remedies: The constitution as a sword*, 85 Harv

L R 1532, 1557 (1972). The primacy of the constitution must eclipse the power of immunity to countenance constitutional violations by the state without concomitant liability.

Therefore, we would remand this case to the Court of Claims[4] for determination of whether an act which violates the state constitution by virtue of a governmental custom or policy has been alleged.

III

The question, subsidiary to this appeal, which next arises is whether a damage remedy exists for violations of individual rights protected by the Michigan Constitution. No general statute provides such a remedy.[5] Can such a remedy be inferred directly from protections found in the Michigan Constitution?

[4] This holding would apply only to actions in our state courts. No intent to judicially abrogate the state's immunity under the Eleventh Amendment of the United States Constitution from suit in federal court is thereby expressed or implied. As the United States Supreme Court stated in *Pennhurst State School & Hosp v Halderman*, 465 US 89, 99-100; 104 S Ct 900; 79 L Ed 2d 67 (1984), "[T]he Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Id.*, p 99, n 9. Thus, waiving immunity to suit in our state courts for violations of our state constitution by the state would not subject the state to suit in federal court for such violations. See, generally, Althouse, *How to build a separate sphere: Federal courts and state power*, 100 Harv L R 1485 (1987) (federal courts' jurisdictional doctrine should respect state autonomy to develop law and procedure so long as federal goals are adequately implemented). Federal cases have held that state statutes conferring exclusive jurisdiction on specific courts over specific claims against the state do not also waive the state's immunity from similar suits in federal court. See, e.g., *McDonald v Illinois*, 557 F2d 596, 600-601 (CA 7, 1977), and *Richins v Industrial Construction, Inc*, 502 F2d 1051 (CA 10, 1974).

[5] In Massachusetts, the Civil Rights Act of 1979 provides a remedy for violations of state constitutional rights. See Massachusetts General Laws Annotated, ch 12, §§ 11 H—11 I. See also *Phillips v Youth Development Program*, 390 Mass 652, 657-658; 459 NE2d 453 (1983) (employment discrimination).

No lawyer is unaware of the damage remedy implicit in *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), for violations by federal officers of rights protected by the Fourth Amendment of the United States Constitution.[8] In *Bivens*, the United States Supreme Court recognized a cause of action for damages against individual federal officers arising directly from the Fourth Amendment, rather than from legislation. In a brief opinion, the Court noted that money damages are "the ordinary remedy for an invasion of personal interests in liberty," *id.* p 395, that the case involved "no special factors counselling hesitation in the absence of affirmative action by Congress," *id.* p 396, and that " '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id.*, p 397, quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803).

After *Bivens*, the United States Supreme Court has inferred damage remedies directly from other provisions of the United States Constitution. See *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979) (Fifth Amendment equal protection cause of action for gender-based discrimination), and *Carlson v Green*, 446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980) (Eighth Amendment cause of action). Lower federal courts have also inferred damage remedies under the First and

[8] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendments. See, generally, Anno: *Implication of private right of action from provision of United States Constitution—Federal cases*, 64 L Ed 2d 872 (1980).

In state courts, the *Bivens*-type judicially inferred damage cause of action for violations of state constitutions has received a varied response. See, generally, Friesen, *Recovering damages for state bills of rights claims*, 63 Tex L R 1269 (1985). Several state courts have recognized damage remedies inferred from state constitutional provisions. See *Widgeon v Eastern Shore Hosp Center*, 300 Md 520; 479 A2d 921 (1984) (improper seizure and due process); *Schreiner v McKenzie Tank Lines*, 408 So 2d 711 (Fla App, 1982), approved by 432 So 2d 567 (Fla, 1983) (employment discrimination); *Gay Law Students Ass'n v Pacific Telephone & Telegraph Co*, 24 Cal 3d 458; 156 Cal Rptr 14; 595 P2d 592 (1979) (Equal Protection Clause); *Walinski v Morrison & Morrison*, 60 Ill App 3d 616; 18 Ill Dec 89; 377 NE2d 242 (1978) (employment discrimination); *Strauss v New Jersey*, 131 NJ Super 571; 330 A2d 646 (1974) (due process violation). Several other state courts have commented favorably upon inferred constitutional damage remedies, albeit in dicta. See, e.g., *Phillips v Youth Development Program*, 390 Mass 652, 657-658; 459 NE2d 453 (1983) ("a person whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief"). Other states have avoided the issue by finding a statutory cause of action. See, e.g., *Alaska v Haley*, 687 P2d 305, 317-3188 (Alas, 1984). Some courts have rejected the remedy primarily, one suspects, because of the doctrines of sovereign or governmental immunity, rather than because of a rejection of the *Bivens* analysis. See *Figueroa v Hawaii*, 61

Hawaii 369, 382; 604 P2d 1198 (1979) ("we are not free to abolish the State's sovereign immunity and the State remains immune from a *Bivens*-type claim"); *Rockhouse Mtn Property Owners Ass'n v Town of Conway*, 127 NH 593; 503 A2d 1385 (1986) (governmental immunity a factor in denying damage remedy for alleged violations of state due process and equal protection).

We would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases. As the *Bivens* Court recognized, there are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy. On the other hand, there are circumstances in which a damage remedy would not be appropriate. The absence of any other remedy would, as in *Bivens*, heighten the urgency of the question. Justice Harlan, concurring in *Bivens*, states that "[t]he question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." 403 US 407. In answering this question in the positive, Justice Harlan commented, "[f]or people in *Bivens'* shoes, it is damages or nothing." *Id.*, p 410. Where a statute provides a remedy, the stark picture of a constitutional provision violated without remedy is not presented. While a *Bivens*-type action may still be inferred, see *Carlson v Green, supra* (federal tort claims remedy no bar to *Bivens* action), the existence of a legislative scheme may constitute "special factors counselling hesitation," *Bivens, supra*, p 396, which militate against a judicially inferred damage remedy. See, e.g., *Bush v Lucas*, 462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983) (no *Bivens*-type damage remedy for federal civil servant alleging First Amendment violations by employer; Congress enacted comprehensive civil service statutes and is in the best position to decide the relevant public policy issues); *Chappell v Wallace*, 462 US 296, 304; 103 S Ct 2362; 76 L Ed 2d 586 (1983) (no *Bivens* remedy for Navy enlistees claiming racial discrimination by superior officers; the unique disciplinary structure of military life and congressional exercise of plenary authority over the military are special factors counselling hesitation).

IV

Whether a damage remedy should be inferred in this case cannot properly be decided on this record. We would remand the case to the trial court for further development below. In light of the complexity of the question, however, the following observations may be helpful.

The first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself. Plaintiff's complaint, count III, item 29, alleges:

> [A] violation of Jack Smith's constitutional rights as set out in the various State Constitutions, including without limitation Art [2], Section 16, of the Michigan Constitution of 1908, in that he was deprived of a meaningful life, deprived of his liberty, and deprived of property elements of his life without due process of law.[7]

Plaintiff's amended complaint, item 29a, alleges "a

[7] The pertinent portion of Const 1908, art 2, § 16 provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The first sentence of Const 1963, art 1, § 17, has identical language.

violation of Jack Smith's constitutional right to equal protection under 1908 Mich Const, Art [2], Section 1."[8] Plaintiff's specific claims thus rest upon equal protection and due process violations.

Federal courts have struggled with the question what constitutes a violation of due process for purposes of 42 USC 1983. See, generally, Winborne, ed, Civil Actions Against State Government, § 10.27 (McGraw-Hill, 1982). The federal Due Process Clause[9] includes three basic components: procedural due process,[10] substantive due process,[11] and incorporation of specific Bill of Rights protections:

> [The Due Process] Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in

[8] Const 1908, art 2, § 1 provides that "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." This provision has been construed as providing equal protection guarantees equivalent to those in the Fourteenth Amendment of the United States Constitution. *Gauthier v Campbell*, 360 Mich 510; 104 NW2d 182 (1960).

[9] The Fourteenth Amendment of the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[10] See, e.g., *Parratt v Taylor*, 451 US 527; 101 S Ct 1908; 68 L Ed 2d 420 (1981) (no violation of procedural due process because postdeprivation procedures were sufficient).

[11] See, e.g., *O'Connor v Donaldson*, 422 US 563, 573-576; 95 S Ct 2486; 45 L Ed 2d 396 (1975) (knowing continued confinement of nondangerous and perhaps sane patient in a mental hospital with no treatment violated patient's "constitutional right to freedom"); *Youngberg v Romeo*, 457 US 307, 324; 102 S Ct 2452; 73 L Ed 2d 28 (1982) (patients in state institution for the retarded constitutionally entitled to "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests").

> the First and Eighth Amendments; so, too, the State must respect the guarantees in the Fourth, Fifth, and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards. [*Daniels v Williams*, 474 US 327, —; 106 S Ct 662; 88 L Ed 2d 662, 672 (1986) (Stevens, J., concurring). Citations omitted.]

In *Daniels v Williams*, the United States Supreme Court held that the negligence of state officials does not constitute a violation of either procedural or substantive due process: "We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." 88 L Ed 2d 666. See also *Davidson v Cannon*, 474 US 344; 106 S Ct 668; 88 L Ed 2d 677 (1986) (official's negligence is not a violation of procedural due process).

The plaintiff's complaint does not specify whether procedural due process or substantive due process claims are at issue. Neither have the parties fully briefed or argued the question whether a constitutional violation actually occurred in this case. Therefore, it is only appropriate to leave this thorny issue for later factual development and legal argument.

The second step in considering an inferred damage remedy for a violation of the Michigan Constitution is to consider the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy. The provision itself may commit creation of a remedy to the Legislature rather than

the courts.[12] Again, the application of this factor to the instant case must be left for development in future proceedings.

Finally, various other factors, dependent upon the specific facts and circumstances of a given case, may militate against a judicially inferred damage remedy for violation of a specific constitutional provision. For example, the federal courts have refused a damage remedy in the face of Congress' exercise of its special authority over the military, see *Chappell v Wallace, supra,* and its special role in personnel management vis-à-vis federal employees, *Bush v Lucas, supra.* Other concerns, such as the degree of specificity of the constitutional protection, should also be considered. For example, there was no question in *Bivens, supra,* that the defendants had violated the warrant requirements of the Fourth Amendment. These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses. See Monaghan, The Supreme Court, 1974 term forward: *Constitutional common law,* 89 Harv L R 1, 44-45 (1975) (substantive guarantees of due process and equal protection are troubling in their indeterminate character). The clarity of the constitutional protection and violation in a given case should be a factor in determining the propriety of a judicially imposed damage remedy. Another factor important in federal cases has been the availability of another remedy. In *Bivens, supra,* the lack of any alternative remedy was certainly a matter of concern to the United States Supreme Court. On the other hand, the presence of an alternate remedy in

[12] See, e.g., Const 1963, art 1, § 2, thought by many to delegate the creation of remedies for equal protection violations solely to the Legislature. Cramton, *The powers of the Michigan Civil Rights Commission,* 63 Mich L R 5, 13 (1964). I make no comment on the propriety of this assumption at this time.

Chappell v Wallace, supra, was a factor weighing against a damage remedy for constitutional violations.

V

CONCLUSION

We would hold that neither statutory nor common-law governmental immunity bars a suit in a state court alleging violation by the state of a right protected by our Michigan Constitution. Furthermore, we would acknowledge the possible propriety of a *Bivens*-type damage remedy for violation of a right protected by our state constitution. Because the record in the instant case, *Smith v Dep't of Public Health,* is inadequate for determining whether a violation of the Michigan Constitution occurred by virtue of a governmental custom or policy, and, if such a violation occurred, whether it is one for which a damage remedy is proper, we would remand the case for further proceedings not inconsistent with this opinion.

CAVANAGH, J., concurred with BOYLE, J.

LEVIN, J. (*separate opinion*). I concur in the result in *Smith* as stated in part v of Justice BOYLE's opinion but, as stated in Justice ARCHER's opinion, would not limit the remand to a determination whether the alleged constitutional violation occurred by "virtue of a governmental custom or policy" or whether "a damage remedy is proper."

ARCHER, J. (*dissenting*). We dissent because we believe that the state is a "person" within the meaning of § 1983. Viewed in the light of its legislative history and its remedial purpose, § 1983 is the appropriate mechanism for securing federal

constitutional rights which the state allegedly has violated.

Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In a § 1983 case, there are two essential elements. First, the act complained of must have been done by a person acting under color of state law, and, second, this act must have deprived the plaintiff of rights, privileges, or immunities secured by the constitution or laws of the United States.

The use of the word "person" in § 1983 is a term of art. Whether the word "person" was meant by the 42nd Congress to include a state has been the source of conflicting opinions in the United States Supreme Court, the federal and state courts, and among the commentators.[1]

As the lead opinion correctly states, the United States Supreme Court in *Quern v Jordan*, 440 US

[1] See, e.g., *Della Grotta v Rhode Island*, 781 F2d 343 (CA 1, 1986) (a state is a "person" within § 1983 such that, where it has voluntarily waived its Eleventh Amendment immunity to suit in federal court, it may be held liable in the same respect as municipalities and local units of government); *Stanton v Godfrey*, 415 NE2d 103 (Ind App, 1981) (the Department of Public Welfare is a person under § 1983 and is a proper defendant); *Weisbord v Michigan State Univ*, 495 F Supp 1347 (WD Mich, 1980) (a state university, its board of trustees, and president were "persons" within the meaning of this section); and *Uberoi v Univ of Colorado*, 713 P2d 894 (Colo, 1986) (a state university is a "person" under § 1983).

332; 99 S Ct 1139; 59 L Ed 2d 358 (1979), never explicitly addressed the issue whether the term "person" in § 1983 included states. The focus of the majority in *Quern* was whether Congress, in enacting § 1983, intended to abrogate the immunity of the states from suit in *federal* court. In the opinion, the majority was primarily concerned with the scope of the states' Eleventh Amendment immunity from suits which would impose a liability which must be paid from public funds in the state treasury.

However, Justice Brennan argued in his opinion, concurring in the judgment in *Quern* that § 1983 was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment.[2] "That Amendment," Justice Brennan stated, "exemplifies the 'vast transformation' worked on the structure of federalism in this Nation by the Civil War." *Quern*, 358.

The prohibitions of the Fourteenth Amendment "'are directed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken.'" *Id.*, 355. Justice Brennan, after reviewing the history of the Fourteenth Amendment, the language and legislative history of § 1983, and the language of the Dictionary Act, which defined "person" by referring to "bodies politic," concluded that the term "person" in § 1983 encompassed states. We agree. We find Justice Brennan's interpretation of the intent of

[2] The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

the 42nd Congress to include the states as "persons" in § 1983 actions to be persuasive. It serves no purpose to further review that history here.

Section 1983 suits are routinely decided in the courts of this state when the defendant is a "person" and is other than the State of Michigan.[3] Under the Supremacy Clause of the United States Constitution,[4] we are duty-bound to enforce the provisions of the United States Constitution as well as valid federal laws. The defendants argue that not only is a state not a person within the meaning of § 1983, but that the state has immunity from being sued directly under the doctrine of sovereign immunity.

Under the doctrine of sovereign immunity, the state, as sovereign, cannot be sued unless the sovereign has consented to suit.

The doctrine is based on English law and rests on the theory that "the king can do no wrong."[5] But the jurisprudence of medieval England has little relevance to America in the twentieth century. The rule of sovereign immunity is a common-law rule and is not of constitutional dimension.

[3] *Dudley v Genesee Co Sheriff*, 50 Mich App 678; 213 NW2d 805 (1973).

[4] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [US Const, art VI, § 2.]

[5] State sovereign immunity has been the subject of a vast commentary. See Borchard, *Governmental responsibility in tort*, 36 Yale L J 1, 17 (1926); Jaffe, *Suits against governments and officers: Sovereign immunity*, 77 Harv L R 1 (1963); Note, *State remedies for federally-created rights*, 47 Minn L R 815 (1963); Wolcher, *Sovereign immunity and the Supremacy Clause: Damages against states in their own courts for constitutional violations*, 69 Cal L R 189 (1981).

The rule has been repeatedly invoked in Michigan[6] to hold the state immune from all suits except to the extent that it consented to be sued in its courts.

The courts of this state have frequently applied the doctrine of sovereign immunity without distinguishing between constitutional and nonconstitutional courses of action. Yet this distinction is of crucial import in this case. The plaintiffs here alleged conduct by the state which infringed rights which are fundamental under the United States Constitution.[7] Yet the lead opinion would hold that the plaintiffs have no remedy for these alleged acts and that therefore the state and its officials are answerable to no one for the alleged damage caused by their conduct.

We find this result deeply disturbing. Certainly this Court has the obligation to protect the fundamental constitutional rights of its citizens and § 1983 provides the mechanism by which citizens can gain redress against the government for alleged unconstitutional conduct by the state. As one commentator observed: "It is a magnificent historical irony that America, a republic whose independence was declared in a document indicting the sovereign for treasonous acts, should adopt without serious examination the doctrine of sovereign immunity."[8] It is even more ironic that under state law, citizens who allege nonconstitutional tortious injuries may sue governmental agencies, both state and local, for their conduct,[9] yet there is no rem-

[6] While it is true that suit against state officials is possible in some circumstances, it would be particularly difficult in these cases.

[7] Because of the issues the plaintiffs have raised, these cases would not be barred by the result of *Daniels v Williams*, 474 US 327; 106 S Ct 662; 88 L Ed 2d 662 (1986).

[8] Note, *Rethinking sovereign immunity after* Bivens, 57 NYU L R 541, 601 (1982).

[9] *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591; 363 NW2d 641 (1984).

edy for plaintiffs in this case. Neither sovereign immunity nor statutory immunity should bar relief when the state allegedly has violated the constitutional rights of its citizens.

In view of the holding on this issue, we do not reach the remaining issues raised in these cases. While we do not address the other issues, we do find that an allegation of an intentional tort is not barred by the governmental immunity statute because such an activity does not constitute a governmental function. *Lockaby v Wayne Co,* 406 Mich 65, 77; 276 NW2d 1 (1979).

In sum, because the common-law doctrine of sovereign immunity is inapplicable to bar suits against a state for alleged infringement of fundamental constitutional rights, we would reverse the decision of the Court of Appeals in *Will,* and affirm the decision of the Court of Appeals in *Smith.*

We are in dissent in *Will,* but Justice BOYLE with Justice CAVANAGH concurring would, in ac-

1) All governmental agencies (state and local) are statutorily liable for injuries arising out of the failure to keep highways in reasonable repair (MCL 691.1402; MSA 3.996[102]), negligent operation of a government-owned motor vehicle by an officer, agent, or employee (MCL 691.1405; MSA 3.996[105]), and dangerous or defective conditions in public buildings under the agency's control (MCL 691.1406; MSA 3.996[106]).

2) All governmental agencies (state and local) have tort liability for injuries arising out of the performance of a proprietary function. "Proprietary function" is defined as any activity conducted primarily for pecuniary profit, excluding activities normally supported by taxes or fees (see MCL 691.1413; MSA 3.996[113]).

3) . . . an agency's *ultra vires* activities are not . . . entitled to immunity.

4) All governmental agencies (state and local) are vicariously liable for the negligent operation of government-owned motor vehicles by their officers, employees, and agents (MCL 691.1405; MSA 3.996[105]). Vicarious liability for all other torts may be imposed on a governmental agency only when its officer, employee, or agent, acting during the course of his employment and within the scope of his authority, commits a tort while engaged in an activity which is non-governmental or proprietary, or which falls within a statutory exception.

cord with the Court of Appeals, remand in *Smith* to the Court of Claims for further proceedings. We join in remand. We would not, however, limit the remand in *Smith* to a determination of whether the alleged constitutional violation occurred by "virtue of a governmental custom or policy" or a "damage remedy is proper," and do not agree that those limitations should be imposed on a remedy for constitutional violation. We nevertheless join in remand in *Smith* for further proceedings to determine, as stated in Justice BOYLE's opinion, "whether a violation of the Michigan Constitution occurred by virtue of a governmental custom or policy, and, if such a violation occurred, whether it is one for which a damage remedy is proper."

LEVIN, J., concurred with ARCHER, J.

GRIFFIN, J., took no part in the decision of these cases.

WILL v DEPT OF CIVIL SERVICE
145 MICH APP 214
377 N.W.2d 826 (1985)
OPINION OF THE COURT

Lick, Emery, DeVine & Mallory, P.C. (by *Lawrence J. Emery),* for plaintiff.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, and *George H. Weller,* Assistant Attorney General, for defendants.

Before: DANHOF, C.J., and GRIBBS and R. M. SHUSTER,* JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM. Plaintiff, a state employee, sued defendants for damages for wrongfully denying him employment with the state police, pursuant to 42 USC 1983 and the Michigan Constitution. The Court of Claims granted plaintiff summary judgment against the Department of State Police and the Director of State Police on the basis of his 42 USC 1983 claim. The Department of State Police and its director (hereinafter defendants) appeal as of right, raising issues of jurisdiction, liability, and damages. Defendants' motion to affirm in plaintiff's cross-appeal was granted.

FACTS

Plaintiff has been a state employee since 1969. He began at level 7 in the Department of State, and was reclassified to level 9. He was then transferred to a level 10 position at the Department of Social Services, and then to a level 11 position as an administrative analyst, an entry supervisory position. In the latter half of 1973, plaintiff sought opportunities to advance to data systems analyst 11, and one of these opportunities arose with the state police. Although plaintiff was ranked number two on the promotional register and the number one candidate withdrew, plaintiff was not hired by the state police that summer. He subsequently obtained a data systems analyst 11 position with the Highway Department in November, 1973.

Unbeknownst to plaintiff, when the defendant department ran a security check on plaintiff, information about plaintiff's student activist brother, Charles, was released. Charles' file contained the notation, "Subject's brother Ray Eugene DOB 2-27-44 made application for employment with MSP. Personnel advised 8-9-73." Plaintiff did not learn of this until 1977, when legislation providing for

maintenance of the so-called "red squad" files, 1950 (Ex Sess) PA 38, 39, and 40, was declared unconstitutional and Charles obtained his file and showed it to his brother, plaintiff.

Plaintiff sought a hearing with the Civil Service Commission, but his grievance was dismissed as untimely. Plaintiff appealed to circuit court, which ordered that plaintiff be granted a hearing. The hearing officer ruled that "partisan considerations" were a substantial factor in plaintiff's being denied employment with the state police, in violation of Const 1963, art 11, § 5 and Civil Services Rules 1.1 and 1.2. Plaintiff was therefore awarded $201.60, the pay difference between administrative analyst 11 and data systems analyst 11 for the period from the date on which the state police hired another candidate for the data systems analyst position, September 23, 1973, to the date on which plaintiff obtained the comparable position with the Highway Department, November 4, 1973.

Plaintiff then began this action in the Court of Claims, seeking damages under 42 USC 1983 and the Michigan Constitution. Accelerated judgment was granted to all defendants on the count pertaining to the Michigan Constitution, as plaintiff had not exhausted his administrative remedies. Based on the grievance decision, summary judgment as to liability was granted in favor of plaintiff and against the Department of State Police and the Director of State Police; and the Department of Civil Service and State Personnel Director were dismissed from the action. After a hearing on damages, the court awarded plaintiff $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages.

ISSUE AND DECISION

May the State of Michigan, its agencies, or their

directors be sued for damages in the Court of Claims under the Fourteenth Amendment and 42 USC 1983?

This panel holds that the Court of Claims has jurisdiction over 42 USC 1983 actions against the state, its agencies, and their directors, but such actions cannot be maintained against the state or its agencies because Congress has not abrogated states' sovereign immunity from § 1983 suits, and the state has not waived its immunity. In addition, liability of a director of a state agency is available only in certain cases and has not been established in this case.

A. *Court of Claims Jurisdiction over a 42 USC 1983 Action*

Defendants argue that the Court of Claims has no jurisdiction over an action brought against the state based on the Fourteenth Amendment. We hold that, while the Court of Claims has jurisdiction over federally created causes of action such as those enacted to enforce the Fourteenth Amendment, the state and its agencies cannot be sued under 42 USC 1983.

The Court of Claims was created, and its jurisdiction defined, in 1939 by the following provision, which has remained intact to the present:

> "The court has power and jurisdiction:
> "(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies." MCL 600.6419(1); MSA 27A.6419(1).

This jurisdiction is exclusive, "except as provided in section 6440". MCL 600.6440; MSA 27A.6440 provides:

"No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts • • •."

The Eleventh Amendment to the U. S. Constitution bars suits by private citizens against the State of Michigan in federal court. *Brown Brothers Equipment Co v Michigan*, 266 F Supp 506 (WD Mich, 1967). The Court of Claims Act does not provide consent for such suits. *Id.* Thus, suits against the State of Michigan by citizens of this state may be brought only in the Court of Claims.

By virtue of the supremacy clause of US Const, art VI, § 2, state courts must give cognizance to federal statutes. *Testa v Katt*, 330 US 386; 67 S Ct 810; 91 L Ed 967 (1947); *Dudley v Genesee County Sheriff*, 50 Mich App 678, 680; 213 NW2d 805 (1973). Although the U. S. Supreme Court has expressly reserved the question whether state courts are obligated to entertain § 1983 actions, *Maine v Thiboutot*, 448 US 1, 3, fn 1; 100 S Ct 2502; 65 L Ed 2d 535 (1980); *Martinez v California*, 444 US 277, 283, fn 7; 100 S Ct 553; 62 L Ed 2d 481 (1980), Michigan courts have permitted such actions without questioning their right to refuse them, *cf. Chamberlain v Brown*, 442 SW2d 248 (Tenn, 1969). Since the Court of Claims has exclusive jurisdiction over all actions against the state, it must have subject-matter jurisdiction over actions against the state brought pursuant to a federal statute such as 42 USC 1983. It was proper for the Court of Claims to assume jurisdiction over this case.

As to the questions of the jurisdiction of the Court of Claims over the state officials, it must be noted that plaintiff did not sue the state officials in

their individual capacities, so a suit against them in federal court for damages would be barred by the Eleventh Amendment because the state would be the party in fact. *Scheuer v Rhodes*, 416 US 232, 238; 94 S Ct 1683; 40 L Ed 2d 90 (1974); *Edelman v Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974). Although the Court of Claims statute does not specifically mention state officials, this Court has interpreted the statute to grant jurisdiction over claims against state officials. *Hamilton v Reynolds*, 129 Mich App 375, 378; 341 NW2d 152 (1984), and cases cited therein.

B. *42 USC 1983 Action Against a State Agency*

The Federal Civil Rights Act provides in 42 USC 1983:

"Every person who, under color of any statute • • • of any state • • • subjects • • • any citizen • • • to the deprivation of any rights • • • secured by the Constitution and laws, shall be liable to the party injured • • •."

Whether a state or any of its agencies is a "person" under this statute has been the subject of ongoing debate in both federal and state courts. As previously mentioned, it is well established that states cannot be sued in federal court because of the Eleventh Amendment. *Stefaniak v Michigan*, 564 F Supp 1194, 1198 (WD Mich, 1983). However, federal courts have dismissed state agencies as defendants, not on Eleventh Amendment grounds, but because they are not "persons" under § 1983. *Laje v R E Thomason General Hospital*, 665 F2d 724, 727 (CA 5, 1982); *Ruiz v Estelle*, 679 F2d 1115 (CA 5, 1982); *Reynolds v Richmond Sheriff*, 574 F Supp 90, 91 (ED Va, 1983); *Mattas v Supreme Court of Pennsylvania*, 576 F Supp 1178, 1182 (WD

Pa, 1983); *Richards v New York State Dep't of Correctional Services*, 572 F Supp 1168, 1172 (SD NY, 1983); *Wrenn v Kansas*, 561 F Supp 1216, 1220 (D Kan, 1983); *Stanislaus Food Products Co v Public Utilities Comm*, 560 F Supp 114 (ND Cal, 1982); *Clark v Michigan*, 498 F Supp 159, 161 (ED Mich, 1980).

The lower federal courts often rely on other lower federal courts because the United States Supreme Court has taken varying stands on this issue. In *Monroe v Pape*, 365 US 167; 81 S Ct 473; 5 L Ed 2d 492 (1961), the Supreme Court ruled that municipalities were not "persons" under 42 USC 1983. The Michigan Supreme Court expanded that ruling to hold that neither the state nor the State Fair Commission could be sued under § 1983. *Hirych v State Fair Comm*, 376 Mich 384, 392; 136 NW2d 910 (1965). But in *Monell v New York City Dep't of Social Services*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the Supreme Court specifically overruled in part *Monroe*, casting the *Hirych* holding into doubt.

In *Quern v Jordan*, 440 US 332; 99 S Ct 1139; 59 L Ed 2d 358 (1979), Justice Rehnquist, writing for the seven-member majority, and Justice Brennan, concurring separately, engaged in vigorous debate over whether the Congress which passed the Civil Rights Act of 1871 intended to include states when it used the word "person". Justice Brennan quoted from a variety of sources indicating states were to be included, but Justice Rehnquist considered this all to be "slender 'evidence' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States". 440 US 341. The United States Supreme Court has not directly addressed this issue since *Quern*.

This Court in *Smith v Michigan*, 122 Mich App

340; 333 NW2d 50 (1983), *lv pending*, while acknowledging that other courts have ruled that states are not "persons" based on the majority holding in *Quern*, held that *Quern* had not decided whether a state is a person, and ruled that the State of Michigan may be sued in its courts for § 1983 actions. Since application for leave to appeal this decision to the Supreme Court was timely filed, *Smith* is of no precedential value. *People v Phillips*, 416 Mich 63, 74; 330 NW2d 366 (1982). This Court recently agreed with *Smith* that *Quern* did not decide whether a state was a § 1983 "person", *Karchefske v Dep't of Mental Health*, 143 Mich App 1; 371 NW2d 876 (1985).

State courts which have considered this question have not taken this position. In addition to cases cited in *Smith, supra*, pp 348-349, see also *Rains v Washington*, 100 Wash 2d 660; 674 P2d 165 (1983); *Mezey v California*, 208 Cal Rptr 40; 161 Cal App 3d 1060 (1984); *Shaw v St Louis*, 664 SW2d 572, 576 (Mo App, 1983). Our research disclosed only two state courts which permitted § 1983 actions against state agencies based on *Monell*; neither discussed *Quern*. *Stanton v Godfrey*, 415 NE2d 103 (Ind App, 1981) (state Department of Public Welfare is a "person" under § 1983, citing *Monell*), but see *Indiana v Hall*, 411 NE2d 366, 369 (Ind App, 1980) ("Sec 1983 does not apply to states"); *Brown v Wood*, 592 P2d 1250 (Alas, 1979) (state university can be sued under § 1983 in light of *Monell*, reversing earlier decision denying action based on *Monroe*).

To the extent that *Smith* and *Karchefske* hold that a state is a person, we cannot agree. The *Karchefske* panel nevertheless held that a § 1983 action against the state was precluded on what it considered to be the separate ground of sovereign immunity; but *Quern* and other cases have deter-

mined that a state must not be a "person" precisely *because* Congress has never exhibited any intent in § 1983 to abolish the doctrine of sovereign immunity. We agree with *Quern* that, if a federal statute is to abrogate states' sovereign immunity, so that states too are "persons" under § 1983, there should be "explicit and clear language indicating on its face an intent to sweep away the immunity of the States". *Quern*, 440 US 345. There being no such language in the statute, the traditional notion of sovereign immunity precludes a conclusion that states are included in the § 1983 rubric "person".

Further, the State of Michigan, through its own statutes, has not voluntarily relinquished its sovereign immunity, except in certain areas not applicable here. *Karchefske, supra.*

Therefore, since § 1983 actions may not be brought against states or their agencies, the judgment against the Department of State Police is vacated.

C. *42 USC 1983 Actions Against State Officials*

Individuals are, of course, persons within the meaning of 42 USC 1983. *Ruiz v Estelle, supra.* State officers who abuse their positions while acting under color of state authority are proper defendants in a 42 USC 1983 civil rights suit. *Drollinger v Milligan*, 552 F2d 1220, 1226 (CA 7, 1977); *Monroe v Pape*, 364 US 172. To establish a § 1983 claim against a state official, plaintiff must show more than mere authority by the defendant over others who have violated plaintiff's rights; plaintiff must prove at least one specific act or omission which was a causative factor in depriving plaintiff of his federal civil rights. *Clark v Michigan, supra*, p 161. Moreover, in a § 1983 action for money damages, public officials have qualified immunity

if they acted in good faith. *Baker v Detroit*, 458 F Supp 379, 383 (ED Mich, 1978).

In attempting to refine the scope of government officials' immunity, our Supreme Court recently observed that an individual should not be held liable merely because it is later determined that he acted under an unconstitutional statute. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 633, fn 41; 363 NW2d 641 (1984).

Since in this case defendants' liability was based solely on the hearing examiner's determination that "partisan considerations" were a substantial factor in denial of plaintiff's promotion, no inquiry was made by the Court of Claims as to the possibility that defendant Director of State Police might be immune from this § 1983 action for damages, nor have either of the parties raised the issue in their briefs. However, in light of the aforementioned law on this issue, we think it critical in this case that the extent of the director's possible liability be explored. While we would not normally reverse a trial court's decision that a person's due process rights were violated based on arguments not raised by either party, in this case the finding of liability could potentially affect all taxpayers in this state, if the state has agreed to indemnify officials such as this. We therefore remand for further proceedings consistent with the points we have made in this regard.

D. *Damages*

Even if defendant director is still determined to be liable to plaintiff for damages in this case, we find some of the damages awards excessive or insupportable.

The Court of Claims awarded plaintiff $56,052 in exemplary damages. "[T]he basic purpose of a section 1983 damages award should be to compen-

sate persons for injuries caused by the deprivation of constitutional rights * * *." *Carey v Piphus,* 435 US 247, 254; 98 S Ct 1042; 55 L Ed 2d 252 (1978). However, where the common law has historically permitted punitive or exemplary damages, such damages may be allowed in a § 1983 action. *Newport v Facts Concerts, Inc,* 453 US 247, 258-259; 101 S Ct 2748; 69 L Ed 2d 616 (1981). Plaintiff relies on the general rule that bad faith, malicious action or outrageous conduct in gross disregard of plaintiff's constitutional rights can support an award for punitive damages. There is no evidence, however, that the state police or its director acted in bad faith, maliciously, or outrageously. There is no evidence of an intent to cover up use of the "red-squad" file, *cf. Webster v Houston,* 689 F2d 1220 (CA 5, 1982), where, despite a showing that police attempted to mask the killing of a teenager, the court refused to award punitive damages. Here, it was defendants who moved for a hearing for plaintiff. The trial judge found no bad faith or malice, but merely that the police were carrying out orders, though without standards. He concluded that "no one can blame the state police". Exemplary damages were clearly erroneous in this case.

The back pay award of $584.64 also appears suspect. How this figure was arrived at does not appear in the record. Plaintiff was interviewed on August 6, 1973. At the time the information from his file was released, August 9, 1973, no promotional register existed, so the earliest that plaintiff could have been hired was August 29, 1973, when the register took effect. Plaintiff's employment with the Highway Department commenced on November 4, 1973. His back pay award should cover only the period from August 29 through November 4. The court instead measured the time period

beginning from August 6, the date on which plaintiff was interviewed. This was erroneous.

Damages for emotional and mental distress are proper in § 1983 cases where plaintiff offers competent evidence to support their award. *Carey v Piphus, supra; Nekolny v Painter,* 653 F2d 1164 (CA 7, 1981), *cert den* 455 US 1021; 102 S Ct 1719; 72 L Ed 2d 139 (1982). In this case, both plaintiff and his wife offered testimony that plaintiff began losing sleep, became paranoid about the police, and was alienated from his fellow workers. Although few cases have yielded such high awards for injuries such as these, the award in this case was supported by competent evidence and was not improper.

Damages of $40,544 for career loss were also calculated from an improper starting date. The only clear evidence of long-term injury by not being hired in August, 1973, by the state police was that in 1981 plaintiff was "bumped" from a level 13 to a level 12 position by another employee with just a few more weeks' seniority than plaintiff. Damages for career loss should be computed from 1981, not from 1973. Plaintiff estimated that cost him about $2,000 per year.

CONCLUSION

The judgment against the Department of State Police is vacated. As to the liability of the Director of the State Police, and appropriate damages if liability is found, we remand for further proceedings in light of this opinion.

GRIBBS, J. *(concurring).* I concur with the majority opinion remanding for inquiry as to the possibility that defendant Director of State Police might be immune from the § 1983 action for dam-

ages and the majority's holding regarding the propriety of damages against defendant director.

I also concur in the majority's holding that the judgment against the Department of State Police be vacated, but on different grounds. I would not reach the question of whether or not the state is a "person" under § 1983, but hold that whether or not the state is a "person" this action against the state is precluded on the grounds of sovereign immunity. *Karchefske v Dep't of Mental Health*, 143 Mich App 1; 371 NW2d 876 (1985).

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No. 87-1207

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Michigan.

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the 42d Congress intend that states be included with the meaning of "person" in §1 of the 1871 Civil Rights Act (42 USC §1983)?

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STATUTES WHICH THE CASE INVOLVES

Section 1 of the Civil Rights Act of 1871 ("Ku Klux Klan Act") ("Third Force Act"); 17 Stat 13, ch 22, §1 (1871).

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication", and the other remedial laws of the United States which are in their nature applicable in such cases.

Section 2 of the "Dictionary Act"; 16 Stat 431, ch 71, §2 (1871)

> SEC. 2. And be it further enacted, That in all acts hereafter passed words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non-compos, lunatic, and insane person; and the word "person" may extend and be applied to bodies politic and corporate, and the reference to any offi-

cer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and the word "oath" shall include "affirmation" in cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall include the word "affirmed."

Subsequently codified in Revised Statues §1 (1st ed 1874), and Revised Statutes §1 (2d ed 1878).

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, noncompos, lunatic and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Section 2 of the Civil Rights Bill of 1866; 14 Stat 27, ch 31, §2 (1866).

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person hav-

ing at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

No. 87-1207

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
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DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Michigan.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Michigan Department of State Police and Director of Michigan State Police, respectfully request that the Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Michigan in this case reported at 428 Mich 540, 410 NW2d 749 (1987).

STATEMENT OF THE CASE

Because his brother's name was indexed to the "Red Squad" files of the Michigan State Police, petitioner Ray Will was not considered by the State Police for a lateral transfer in 1973 from Administrative Analyst 11 at the Michigan Department of Mental Health to Data Systems Analyst 11 at the Michigan Department of State Police. Two months and seven days later, Mr. Will obtained a Data Systems Analyst 11 position with the Michigan Department of Transportation.

The Michigan State Police were required by 1950 Michigan Public Acts, Extra Session, No. 38, 39 and 40 to collect, obtain, and compile information and evidence on, and to investigate activities pertaining to broad and ill defined areas relating to subversion and security. With the consent of the Michigan Attorney General, these laws were declared unconstitutional by a Michigan Circuit Court on February 3, 1976, and repealed by 1978 Michigan Public Act No. 571.

The "Red Squad" records of Mr. Will's brother were released to his brother in 1977.

When Mr. Will learned in 1977 of the reason he was not considered by the State Police, he filed a Civil Service grievance that was originally denied because it was too late.

Over Mr. Will's objection, the Michigan Attorney General successfully moved in March of 1978 for the return of the grievance matter to the Civil Service grievance system for a full hearing.

In November of 1978, Mr. Will sued in the Michigan Court of Claims, the court of exclusive original jurisdiction for claims against the State, alleging a cause of action under 42 USC §1983.

On June 10, 1980 the Civil Service Hearing Officer held, and the Civil Service Commission later upheld, that although "Mr. Will was not one of the exemplary candidates in the field" for transfer (Hearing Officer's Opinion, pg 7. HO 263-80), the State Police use of the fact that his brother was indexed to the "Red Squad" files was a substantial factor in Mr. Will not even being considered for a transfer, and this violated the 1963 Michigan constitution's prohibition in art 11, §5, para 6 on the use of "partisan considerations" in civil service transfers. Mr. Will was awarded back pay for the 2 months and 7 days until Mr. Will got a transfer at the same level to the Michigan Department of Transportation.

Mr. Will did not appeal the grievance decision nor did the State. On July 22, 1981 the parties accepted the June 10, 1980 grievance decision as the factual premise for the Court of Claims proceedings.

In a December 15, 1982 opinion in the Court of Claims case, the judge held that the state is a "person" under 42 USC §1983.

On December 30, 1982 the judge entered judgment on liability against the Michigan State Police defendants. On March 8, 1983 the judge entered judgment on damages against the Michigan State Police defendants for $153,262.64.

The Michigan Court of Appeals reversed in an appeal of right on July 9, 1985 on the §1983 issue, holding that the state was not a "person" under §1983 (Pet. App 132a), but remanded to the Court of Claims for a determination of the liability of the Director of the Michigan State Police in his official capacity (Pet. App 133a). The damage award was significantly reduced (Pet. App 134a-135a).

On August 7, 1987, the Michigan Supreme Court, by a 4-2 decision in an appeal by leave granted, affirmed the Court of Appeals decision that the state is not a "person" under 42 USC §1983 (Pet. App 9a), but reversed the Court of Appeals remand on the liability of the Director of the Michigan State Police in his official capacity (Pet. App 102a), holding that a suit for damages against a state official in his official capacity is in fact a suit against the state, and the official is not a "person" under 42 USC §1983 (Pet. App 9a). Justice Brickley authored, and Chief Justice Riley joined, a detailed rationale (Pet. App 18a-54a).

The Michigan Supreme Court denied rehearing on October 17, 1987 (Pet. App 2a).

The Petition for Certiorari was received by the State's counsel on January 8, 1988. The case was docketed on January 11, 1988. Respondents on February 3, 1988 responded by letter. On February 26, 1988 the Court requested a brief to be filed by March 28, 1988.

ARGUMENT

I.

PETITIONER'S CHARACTERIZATION OF THE MICHIGAN SUPREME COURT'S DECISION AND HIS ASSERTION OF A CONFLICT IN DECISIONS ARE INADEQUATE TO DEMONSTRATE ANY NEED FOR THIS COURT TO GRANT REVIEW.

A majority of the justices of the Michigan Supreme Court joined only in the short "Memorandum Opinion" that does not contain a detailed rationale, but merely holds, "The State is not a 'person' for purposes of a damage suit under §1983. Pet. App 9a-10a. The rationale that Petitioner challenges is found only in an opinion signed by two justices of the Michigan Supreme Court authored by justice Brickley, concurring with the Memorandum Opinion. Pet. App 10a & 102a. Two additional justices concurred only with the conclusion that "the State is not a 'person' for purposes of 42 USC 1983." Pet. App 102a & 117a.

Although, as explained in Argument II in this Brief in Opposition to the Petition, Respondents agree with both the conclusion that the State is not a "person" and with the rationale of justice Brickley's opinion, the fact that there is no majority opinion of the Michigan Supreme Court explaining its decision militates against granting certiorari.

Other factors that militate against the grant of certiorari are that (A) the petition overstates the degree of conflict between this Michigan Supreme Court decision and other state courts-of last resort or federal courts of appeal on the question of whether Congress intended to include the states as a "person" in section 1 of the 1871 Civil Rights Act, now 42 USC §1983; and that (B) the Petition seriously mischaracterizes the rationale of justice Brickley's opinion.

A. THE PETITION OVERSTATES THE DEGREE OF CONFLICT.

Conflicts between state courts of last resort, or between a state court of last resort and United States Courts of Appeal, may involve issues of federal law sufficiently important for this Court to grant certiorari. Supreme Court Rule 17.1(b) & (c). However, with respect to this Michigan case, Respondents submit that the degree of conflict with state courts of last resort and with the United States Courts of Appeal is overstated by Petitioner.

Respondent's Appendix lists those state courts of last resort and those United States Courts of Appeal of which Respondents are aware, that have handed down decisions subsequent to *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978), saying a state is not a "person".

The United States Court of Appeals for the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held or affirmed District Court decisions that held that a state is not a "person". Respondent's App 2b. Only the United States Court of Appeals for the First Circuit has held that a state is a "person". *Della Grotta* v *State of Rhode Island*, 781 F2d 343, 349 (CA 1 1986).

The *Della Grotta* Court relied upon the analysis in *Marrapese* v *State of Rhode Island*, 500 F Supp 1207 (DRI 1980), a decision that was reversed by the First Circuit because the action

was not timely brought. 749 F2d 934 (CA 1 1984), *cert. denied*, 474 U.S. 921 (1985). The *Della Grotta* Court also relied on the concept that the state of Rhode Island, one of only a few states to have waived its sovereign immunity from suit in a federal court, was part of "bodies politic" (781 F2d at 348). That is, the *Della Grotta* Court implied without citation that the "Dictionary Act" of 1871 applied. That the "Dictionary Act" does not apply to the 1871 Civil Rights Act is demonstrated, *infra* in Argument II.B. of this brief.

Petitioner's citation of *Brogan v Wiggins School District*, 588 F2d 409 (CA 10 1978), as being in conflict is totally erroneous. In the December 1978 decision, 6 months after *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978), the United States Court of Appeals said of the 1976 claims by the pro se plaintiff and appellant: "This claim [under §1983], however, has no merit because it seeks money damages (rather than injunctive relief, for example). Since the Colorado State Board of Education is not a suable entity in a money damage action, the trial court was correct in its ruling." 588 F2d at 411.

Nor is there any conflict, as petitioner argues, with the U.S. Court of Appeals for the Fifth Circuit. In *Ruiz* v *Estelle*, 679 F2d 1115, 1137 (CA 5 1982), *cert denied*, 460 US 1042 (1983), the Fifth Circuit clearly held that a state is not a "person". Petitioner claims a conflict with *Gay Student Services* v *Texas A & M University*, 612 F2d 160, 163-164 (CA 5 1980), *cert. denied* 449 US 1034 (1980). *Gay Student Services* did not hold that a state is a "person", it held that "there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities." 612 F2d at 164.

State courts of last resort that have held a state is not a "person" are those of Alaska, Idaho, Maine, Michigan, New York, and Washington. Respondent's App 3b.

No state court of last resort has "held" that a state is a "person".

In a Maryland case, *De Bleecker* v *Montgomery County*, 292 Md 498, 438 A2d 1348 (1982), the plaintiff was suing a county in Maryland because of his discharge from public employment. In gratuitous obiter dictum without any rationale, the Maryland Court of Appeals said in a footnote: "Unlike municipalities, the State and its agencies are immune from suit under §1983, unless the immunity is waived. *Quern* v *Jordan*, 440 U.S. 332, 99 SCt 1139, 59 L.Ed.2d 358 (1979); . . .". 292 Md at 513 n. 4, 438 A2d at 1356 n. 4.

Gumbhir v *Kansas State Board of Pharmacy*, 231 Kan 507, 646 P2d 1078 (1982), *cert denied*, 459 US 1103 (1983), cited by Petitioner as being in conflict with *Will*, was a suit for attorney's fees under 42 USC §1988 in which the Kansas Supreme Court concluded that "the Kansas State Board of Pharmacy did not subject Gumbhir to a deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. Thus Gumbhir is not a prevailing party as required since there was no 42 U.S.C. §1983 violation upon which a civil rights attorney fee claims could be based." 231 Kan at 523, 646 P2d at 1090. Since there was no §1983 violation, the court's statement that "the sounder view in a case such as this, where prospective injunctive relief is sought, is that a state agency should be considered a 'person' under the statute.", 231 Kan at 513, 646 P2d at 1084, is gratuitous obiter dictum.

In *Beck* v *Kansas Adult Authority*, 241 Kan 13, 21, 735 P2d 222, 229 (1987), the Kansas Supreme Court stated that "[w]e have never held that state agencies were persons under 42 U.S.C. §1983 for the purpose of suits seeking damages thereunder. . . . (The state of Kansas has not waived its sovereign immunity from suits seeking monetary damages under 42 U.S.C. §1983.)"

In *Kimberly* v *City of Green River*, 663 P2d 871 (Wyo 1983), the Wyoming Supreme Court held that "[s]ince all of the appellee natural persons had a viable immunity from suit as a defense to all charges of tortious conduct, there is no liability incurred by the State of Wyoming . . .". 663 P2d at 888. Despite this lack of liability on the part of the State, the Wyoming Supreme Court said in gratuitous obiter dictum; "With respect to appellants' claim of deprivation of constitutional rights pursuant to the Federal Civil Rights Act, 42 U.S.C. §1981, et seq, it is now clear that the state and municipalities, including counties, are within its sweep and treated as natural 'persons,' though artificially so." 663 P2d at 883 No rationale for the conclusion was given.

Uberoi v *University of Colorado*, 713 P2d 894 (Colo 1986), *pet for cert filed*, 56 USLW 3592 (U.S. Feb 11, 1988) (No. 87-1351), cited by Petitioner as being in conflict with *Will*, speaks only in terms of universities. Of the four post-*Monell* cases cited, three pertain to educational institutions not considered to be state entities, but equivalent to local government entities. Only one cited case, *Weisbord* v *Michigan State University*, 495 FSupp 1347 (WDMich 1980), pertains to a state entity. It would seem that the Colorado Supreme Court in its reference to *Monell* v *Department of Social Services of the City of New York*, 436 US 658 (1978); to "local governing bodies" and "local governments"; and to cases involving universities that were held to be the equivalent of local governing bodies, came to hold that the University of Colorado was a "person" because the University was equivalent to a local governing body. This conclusion is reinforced by the language in the two dissents that refer to "a local governing body such as a university", and to "local governments." 713 P2d at 904. The plaintiff-appellant, professor Uberoi appeared pro se.

Thus, of the decisions by the state courts of last resort and United States Courts of Appeal cited by Petitioner, and those others known to Respondent, only one is in conflict with the

conclusion of the Michigan Supreme Court and with the rationale of justice Brickley's opinion. This is not the type of pervasive conflict which requires review by this court.

B. THE PETITION MISCHARACTERIZES THE RATIONALE OF THE OPINION OF TWO JUSTICES OF THE MICHIGAN SUPREME COURT, AUTHORED BY JUSTICE BRICKLEY.

The Petitioner's mischaracterizations regarding the existence of a conflict continue in Argument IV of his Petition where Petitioner incorrectly asserts that the rationale of justice Brickley's opinion conflicts with the views of this Court.

Petitioner seeks to create the impression that justice Brickley's opinion stands for the proposition that Michigan courts will not entertain any §1983 cause of action. This is untrue. Michigan courts entertain causes of action against local governing bodies, *e.g., Electro-Tech, Inc.* v *H.F. Campbell Co. and City of Westland*, 161 Mich App 622, 411 NW2d 800 (1987), *lv applied for* Oct 19, 1987, SCt No. 81866; and against individuals, *e.g. Boggerty* v *Wilson*, 160 Mich App 514, 408 NW2d 809 (1987), *lv denied* ____ Mich ____ (1988) (Feb 22, 1988, SCt No. 81506). In the instant case the Michigan Supreme Court concluded only that Congress did not intend to include states within the meaning of "person" in 42 USC §1983, and that a suit in Michigan's Court of Claims against a state official in his official capacity is a suit against the state, hence that suit is barred because the state is not a "person".

Petitioner at pages 26-27 of his Petition attempts to obfuscate justice Brickley's rationale by injecting the irrelevant concept of Congressional abrogation of Eleventh Amendment immunity, and by ignoring the underlying "fundamental principle of sovereign immunity", "of which the [Eleventh] Amendment is but an exemplification." *See, e.g. Pennhurst State School & Hospital* v *Halderman*, 465 US 89, 98-99 (1984).

C. THERE IS NO NEED FOR THE COURT TO GRANT REVIEW.

A careful analysis demonstrates that there is no irreconcilable conflict as to either result or rationale among the decisions of the state courts of last resort or the United States Courts of Appeal on the question of whether Congress intended to include states as "persons" in the 1871 Civil Rights Act.

If the conclusion of the Supreme Court of Michigan and the rationale of justice Brickley's opinion will "have a great influence on other state courts" (Pet. brief p 27), it will be because justice Brickley's rationale is so thorough and because the conclusion is correct.

Those state courts of last resort and those United States Courts of Appeal that have given careful thought to the question, and that have had factual situations before them that called for a holding rather than dictum, have concluded that Congress did not intend to include states as "persons" in the 1871 Civil Rights Act. The presence of decisions such as this case with the in depth rationale of the two justices, will in time have a persuasive effect on subsequent cases from around the country.

Respondents submit that the conflict Petitioner asserts is more apparent than real, and any conflict which exists is tolerable.

There is no need to grant Petitioner's petition.

II.

THE MICHIGAN SUPREME COURT CORRECTLY CONCLUDED THAT CONGRESS DID NOT INTEND TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON" IN §1 OF THE CIVIL RIGHTS ACT OF 1871 (42 USC §1983).

A. THE "EVENTS AND PASSIONS OF THE TIME IN WHICH THE LAW WAS FORGED" DO NOT GIVE ANY INDICATION THAT CONGRESS INTENDED TO SUBJECT THE STATES TO SUIT ON A FEDERAL CAUSE OF ACTION IN THEIR OWN COURTS FOR A CIVIL RIGHTS DEPRIVATION.

1. "EVENTS AND PASSIONS" LEADING TO THE CIVIL RIGHTS ACT OF 1871.

The Court said in 1982:

" ' . . . be mindful of the 'events and passions of the time in which the law was forged.' "

> *General Building Contractors Association, Inc v Pennsylvania*, 458 US 375, 386 (1982).

Led by a group of Republicans called "Radicals", Congress took the initiative after the Civil War ended. K.M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877, 83-118 (1965).

Congress stated that Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia did not have legal state governments, hence they were subject to military commanders and to "the paramount authority of Congress." 15 Stat 14, ch 30 (Tennessee had been "restored" on July 24, 1866 (Joint Resolution 73, 14 Stat 364)).

The former rebel states were gradually "restored"; that is, they met Radical Republican standards under a Republican President (General Grant). By the end of 1870, all former rebel states had been "restored", and all but one had reconstruction governments. The exception was North Carolina that had lost its reconstruction government in 1870. *E.g.*: R.S. HENRY, THE STORY OF RECONSTRUCTION 414 (1938). This remained the situation through 1871. J.W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 1866-1876, 249 (1902).

The focus of Congressional concern had shifted from hostile state statutes against Blacks to the activities of groups like the Ku Klux Klan, operating wholly outside the law. *Jones v Alfred H. Mayer Co*, 392 US 409, 436 (1968).

Several of the former rebel states had passed anti-Ku Klux Klan laws. These acts were ineffective and enforcement was impossible. 2 E. P. OBERHOLTZER, A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 371 (1922).

Congress reacted with the "Force Acts". On May 31, 1870, the First Force Act, 16 Stat 140, ch 114, sought to guarantee the voting privilege to Blacks in the Southern States with penalties for obstructing that right. Control was put in the U.S. Courts, with the president authorized to employ the land and naval forces. Section 18 of the 1870 First Force Act reenacted the Civil Rights Bill of April 9, 1866 (14 Stat 27, ch 31). *See, also* §17.

Nothing changed. Masses of reports came to President Grant from military officers in the South. Southern Governors and other civil officials appealed to the President. Petitions and sworn accounts were received.

A second "Force Act" was enacted on February 28, 1871 (16 Stat 433, ch 99), that amended and strengthened the First Force Act of May 31, 1870.

Despite all of this, conditions in the South continued to deteriorate (2 E.P. OBERHOLTZER, HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 368-380 (1922)); in part because radical Republican dedication was gradually being moderated, K.S. STAMPP, THE ERA OF RECONSTRUCTION 186-215 (1965).

President Grant was skeptical of using the army to enforce racial justice, and he did not want to be charged with being a military dictator. He had sanctioned an earlier bill that had been defeated, and the Congressional managers of the legislation concluded that they could not put through any legislation without a strong call for it by the President. W.S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); A.W. TRELEASE, WHITE TERROR 387-388 (1971).

While President Grant was on his way by carriage to Capitol Hill on March 23, 1871 to tell leading Congressman that he could not endorse legislation that might result in the use of troops for its enforcement, George Boutwell, the Secretary of Treasury, tried to dissuade him. This effort, coupled with the citations of atrocities Grant heard at the Capitol, caused Grant to agree to give a public endorsement. This came later on the same day, March 23, 1871, in a message in which Grant asked for special help for the Restoration governments (7 A Compilation of the Messages and Papers of the Presidents, 1789-1897, p 127 (H. Misc Doc 210, part 7, 53d Cong, 2d Sess)). W.S. McFEELEY, GRANT: A BIOGRAPHY 369 (1981); 2 G.S. BOUTWELL: REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902). *See, Monroe v Pape*, 365 US 167, 172-173 (1961).

President Grant's March 23, 1871 message said:

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue

> dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
>
> Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States . . .".

These, thus, were the "events and passions of the time in which the law was forged."

The questions raised by the "events and the passions" of early 1871 is whether a predominately Republican Congress, in response to a Congressionally invited call from a Republican president for additional federal executive authority to "secure life, liberty, and property and the enforcement of law in all parts of the United States", but particularly in "some of the States of the Union" (the former rebel states with their restored Republican governments), would react to such a call with a law that imposed civil liability on the very states most needing assistance, states for which the power to protect the security of life and property was beyond their control.

Two Justices of the Michigan Supreme Court made an "historical analysis of the reasons why Congress enacted the Ku Klux Klan Act of 1871", and properly concluded that the 1871 Congress did not intend to include the States as "persons" (Pet. App 42a-45a).

2. SOVEREIGN IMMUNITY FROM SUIT WAS THE RULE OF LAW IN 1871.

When in 1871 the debate started on what was to become

today's 42 USC §1983, the rule of law was that a sovereign, the United States and the states, could not be sued without its consent in its own courts by its own citizens; nor could a state be sued in a federal court without its consent by one of its own citizens, a citizen of another state, or citizens or subjects of a foreign state. *E.g.*: 1 COOLEY'S BLACKSTONE 155, n.2 (1st ed 1871) ("A government is not liable to be sued in its own courts except by its own consent; . . . "; *Coster v City of Albany*, 43 NY 399, 407 (1871); *Pennsylvania Railroad Co v Dusquene Borough*, 46 Pa (10 Wright) 223, 228 (1864); *Rose v Governor*, 24 Tex 496, 504 (1859).

In *Kentucky v Graham*, 473 US 159, 169 n.17 (1985), the Justices agreed unanimously that

> "The Court has held that §1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern* v. *Jordan*, 440 U.S. 332 [345] (1979) . . .".

The question thus narrows to whether the members of the 42nd Congress, 1st Session, intended in 1871, under the "events and passions of the time", to change the prevailing rule of law on sovereign immunity. Did the members of Congress intend that a state could be sued by one of its own citizens on a federal civil rights cause of action in its own state courts without its consent when the power to protect the security of life and property was beyond the state's control, and the federal executive was seeking additional statutory authority to assist the state in securing "life, liberty, and property, and the enforcement of law"? Did the members of Congress intend that a state could be sued by one of its own citizens in the federal courts on a federal civil rights cause of action by waving its sovereign (Eleventh Amendment) immunity?

Two Justices of the Michigan Supreme Court property concluded that it was

" 'unlikely, however, that Congress would have intended to enact a statute creating a remedy for violation of civil rights, while at the same time precluding private individuals from bringing actions under the statute against states in federal court but permitting such actions against states in state courts.

* * *

[I]t is our opinion based on *Quern v. Jordan*, 440 US 332 (1979) and decisions of other states that the term "persons" in §1983 was not intended to include states and state agencies.' " (Pet. App 44a-45a).

B. THE "DICTIONARY ACT", 16 STAT 431, CH 71, DID NOT DETERMINE THAT "PERSON" IN THE CIVIL RIGHTS ACT OF 1871 INCLUDED STATES.

The Congressional debate on HR 1351, 41st Cong. Sess 3, that became the "Dictionary Act", illustrates that the purpose of the "Dictionary Act" was to provide guidance to a codification commission that had been authorized on June 27, 1866, 14 Stat 74, ch 140.

> "We cannot pass a law that will bind other Congresses; but if we pass a law prescribing the language of our statutes . . . we can conform to it in our legislation." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871) (Sen Trumbull).
>
> "[T]he purpose of the bill [HR 1351] is to control the action of the commission on codification now proceeding." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871) (Sen Conkling).
>
> "The importance of the whole bill arises mainly from the fact that all our national statutes are now in process of revision, and in such a state of forwardness as to warrant the expectation that we may soon have a well-arranged and compacted body of operative statutes.

> . . .
>
> The other sections established a few general rules for the construction of statutes . . . all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong Globe, 41st Cong, Sess 3, 1474 (Feb 21, 1871) (Rep Poland).

The "Dictionary Act" in §2 said:

> "That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . .".

"[L]ocal government units which are not considered part of the State for Eleventh Amendment purposes" such as municipalities are "persons" because in 1871 municipal corporations were analogized to private corporations and "were treated as as natural persons for virtually all purposes of constitutional and statutory analysis." *E.g.: Owen v City of Independence, Missouri*, 445 US 622, 638-639 (1980).

It is almost impossible to believe that the members of the 42nd Congress would have intended to do away with the long-standing tradition of the immunity of a state from suit by a citizen in its own courts, and in the federal courts, through a mechanism enacted by the 41st Congress that was meant to "control the action of the commission on codification now proceeding." Cong Globe, 41st Cong, Sess 3, 776 (Jan 27, 1871).

This is particularly hard to believe when it is discovered that the Commission on Codification did not use the definition of "person" from the 41st Cong, 3rd Session, February 25, 1871 "Dictionary Act". *See, Monroe v Pape*, 365 US 167, 190 n.47 (1961).

When the codification was finally enacted as the Revised Statutes, this is what became of the pertinent part of §2 of the "Dictionary Act".

"In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February Twenty-Fifth, Eighteen Hundred and Seventy-one, . . . the word 'person' may extend and be applied to partnerships and corporations . . .". Revised Statutes §1 (1874) & (1878).

The Civil Rights Act of 1871 was passed on April 20, 1871.

The Commissioners who drafted the Revised Statutes explained the change as follows:

"Substantially the same as section 2 of the Act of February 25, 1871, ch. 16, *Stat. at L.*, substituting at the commencement the words 'In * * * 1871,' for 'That in all acts hereafter passed;' also, substituting the words 'partnerships and corporations' for 'bodies politic and corporate.' The reasons for the latter change are that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, and should be understood to include a government, such as a State, while 'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded."

1 Revision of the United States Statutes as drafted by the Commissioners Appointed for That Purpose. In Two Volumes. As Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress on the Revision of the Laws, p. 19 (1872).

Since "body politic and corporate" may refer to either a government (*United States v Maurice*, 26 FCas 1211, 1216 (CC DVa 1823) (No. 15747) (Marshall, C.J.)), or to an artificial body of individuals (*Warner v Beers*, 23 Wend 103, 122 (NY Ct Corr Errors 1840)), the Commissioners did not know which meaning to derive from the "Dictionary Act". Congress resolved this in Revised Statutes §1 (1874) & (1878) by saying, in effect, that "person" was meant to apply only to partnerships and corporations, and that in any act enacted after the date of the "Dictionary Act" this was the meaning. This could include a governmental body, such as municipality treated as a corporation; *see; Northwestern Fertilizing Co v Hyde Park*, 18 FCas 393 (CC ND Ill) (1873) (No. 10,336); but not a state, which is not so treated.

Since the Civil Rights Act of 1871 was enacted 2 months after the "Dictionary Act", "person" in the Civil Rights Act of 1871 did not refer to a state.

This is reflected in the Congressional debates on the 1871 Civil Rights Act in which there does not appear to be any comment that the 1871 Civil Rights Act applies to states because of the definition in the "Dictionary Act".

Two Justices of the Michigan Supreme Court properly concluded that the "Dictionary Act" is not to be interpreted as meaning that the 1871 Congress intended a state to be a "person" (Pet. App 46a). As the two Justices said (Pet. App 46a):

"[T]he Dictionary Act, enacted two months prior to the Ku Klux Klan Act . . . was enacted five years *after* the model for §1 of the Ku Klux Klan Act, §2 of the Civil Rights Act of 1866 [14 Stat 27]." (emphasis in opinion).

C. THE LEGISLATIVE HISTORY OF THE 1871 ACT DOES NOT WARRANT THE CONCLUSION THAT CONGRESS INTENDED TO REQUIRE THOSE SEEKING REDRESS FOR A DEPRIVATION OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION TO SEEK REDRESS IN THE VERY STATE COURTS WHOSE DENIAL OF REDRESS BROUGHT ON THE 1871 ACT.

Although the state courts retained concurrent jurisdiction, *Patsy v Board of Regents of the State of Florida*, 457 US 496, 506-507 (1982), ". . . state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.", *Mitchum v Foster*, 407 US 225, 240 (1972). "Congress enacted §1983 and its predecessor, §2 of the Civil Rights Act of 1866, 14 Stat 27, to provide an independent avenue for protection of federal constitutional rights.", *Pulliam v Allen*, 466 US 522, 540 (1984). "[I]f state judiciaries could have been counted on to enforce the provisions of the federal constitution, the entire legislative scheme would have been unnecessary.", Nichol: *Federalism, State Courts, and Section 1983*, 73 Va L Rev 959, 974 (1987).

In *Kentucky v Graham*, 473 US 159, 169 n.17 (1985), the Court agreed that it had held §1983 was not intended to abrogate a State's Eleventh Amendment immunity. To argue that a state is a "person" under 42 USC §1983 is to argue that Congress in 1871 intended to create federal causes of action against states for deprivation of federal Constitutional rights to be brought in the state courts only, even though the purpose of the 1871 Act was to put these kind of cases in the federal courts because the state courts were not doing their job.

Two Justices of the Supreme Court of Michigan properly concluded that this was not the intent of Congress. Pet. App 42a, 43a, and 44a.

The legislative history has been thoroughly examined in *Monroe v Pape*, 365 US 167 (1961); *Monell v Department of Social Services of the City of New York*, 436 US 658 (1978); and *Quern v Jordan*, 440 US 332 (1979).

Respondents submit that there is no indication from the legislative history that the states were to be included within the meaning of the word "person".

As two Justices of the Michigan Supreme Court said in their concluding paragraph on the question:

> "The circumstances surrounding passage of §1983 further support this conclusion." (Pet. App 47a).

The two Justices are correct.

CONCLUSION

For reasons stated in this brief, Respondents respectfully request that the Court deny the petition for certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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APPENDIX

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Decisions by United States Courts of Appeal and by State Courts of last resort that a state is not a "person" under 42 USC §1983.

United States Courts of Appeal 2b

State Courts of Last Resort 3b

DECISIONS BY UNITED STATES COURTS OF APPEAL AND BY STATE COURTS OF LAST RESORT THAT A STATE IS NOT A "PERSON" UNDER 42 USC §1983.

UNITED STATES COURTS OF APPEAL.

FOURTH CIRCUIT.

Bennett v Reed,
676 F2d 690 (CA 4 1982), *aff'g mem*, 534 FSupp 83, 85 (EDNC 1981).

FIFTH CIRCUIT.

Ruiz v Estelle, 679 F2d 1115, 1137 (CA5 1982), *cert denied*, 460 US 1042 (1983).

SIXTH CIRCUIT.

Gross v University of Tennessee, 620 F2d 109, 110 (CA6 1980) (per curiam),
aff'g, 448 FSupp 245, 247-248 (WDTenn 1978).

SEVENTH CIRCUIT.

Toledo, Peoria & Western Railroad Co v State of Illinois, Department of Transportation,
744 F2d 1296, 1297 (CA7 1984), *cert denied*, 470 US 1051 (1985).

See, also:
Harris v Missouri Court of Appeals, Western District,
787 F2d 427, 429 (CA 8 1986),
cert denied, 107 SCt 179 (1986).

STATE COURTS OF LAST RESORT.

ALASKA.

State v Green,
633 P2d 1381, 1382 (Alaska 1981).

Accord: Wickwire v State,
725 Pd 695, 704 n.9 (Alaska 1986).

IDAHO.

Merritt for Merritt v State,
108 Id 20, 26, 696 P2d 871, 877 (1985).

MAINE.

Thiboutot v State of Maine,
405 A2d 230, 236 (Maine 1979),
aff'd on other grounds, 448 US 1 (1980).

MICHIGAN.

Will v Department of Civil Service,
428 Mich 540, 544, 410 NW2d 749, 750 (1987), *pet for cert filed, sub nom, Will v Michigan Department of State Police*, 56 U.S.L.W 3530 (U.S., Jan 11, 1987), (SCt No. 87-1207).

NEW YORK.

Thomas v New York Temporary State Commission on Regulation of Lobbying . . .,
56 NW2d 656, 451 NYS2d 708, 436 NE2d 1310 (1982),
aff'g 83 AD2d 723, 442 NYS2d 632, 634 (3rd Dept 1981).

WASHINGTON.

Edgar v State,
92 Wash2d 217, 221, 595 P2d 534, 537 (1979), *cert denied*, 444 US 1077 (1980),

Accord: Hontz v State,
105 Wash2d 302, 309, 714 P2d 1176, 1180 (1986).

No. 87-1207

(3)

Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAY WILL,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

JOINT APPENDIX

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PETITION FOR *CERTIORARI* FILED JANUARY 11, 1988
CERTIORARI GRANTED APRIL 18, 1988

82 pp

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* The opinions of the Michigan Court of Appeals and the Michigan Supreme Court are printed in the appendix to the petition for a writ of certiorari and have not been produced here.

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Court of Claims Opinion Granting Summary Judgment on Liability (November 15, 1982) 59

Court of Claims Judgment (December 30, 1982) 66

Court of Claims Bench Opinion Stating Findings of Fact and Conclusions of Law (March 8, 1983) 69

Court of Claims Final Judgment as to Amount of Damages (November 2, 1983) 78

MICHIGAN COURT OF CLAIMS

CASE NUMBER 6667

Plaintiff

Ray Eugene Will

Attorney

Mr. Lawrence J. Emery
REID AND REID, P.C.
530 South Capitol
Lansing, MI 48933

Defendant

THE STATE OF MICHIGAN and Department of Civil Service, Michigan Department of State Police, State Personnel Director, Director of Michigan State Police

Attorney

For Department of Civil Service and State Personnel Director Mr. Robert S. Welliver
For State Police—See back

THE HONORABLE Thomas L. Brown

Date	Proceedings
1978	
Nov. 10	COMPLAINT filed. Copies sent to Mr. Krasicky and Department of Civil Service and Department of State Police.
Nov. 10	MOTION FOR CONSOLIDATION filed by Plaintiff.
Dec. 5	APPEARANCE and NOTICE (of Robert S. Welliver, Assistant Attorney General, as Attorney for Defendants Department of Civil Service and State Personnel Director) filed.

Dec. 5 ANSWER TO MOTION FOR CONSOLIDATION filed by Defendants Department of Civil Service and State Personnel Director.

Dec. 5 MOTION FOR SUMMARY AND/OR ACCELERATED JUDGMENT, MEMORANDUM OF LAW IN SUPPORT OF MOTIONS OF DEFENDANTS DEPARTMENT OF CIVIL SERVICE AND STATE PERSONNEL DIRECTOR, NOTICE OF HEARING and PROOF OF SERVICE filed by Defendants Department of Civil Service and State Personnel Director.

Dec. 6 MOTION FOR SUMMARY JUDGMENT AND ACCELERATED JUDGMENT, MEMORANDUM OF LAW, NOTICE OF HEARING and PROOF OF SERVICE filed by Defendants Michigan Department of State Police and Director of Michigan State Police.

1979

Mar. 14 MOTION FOR SUMMARY JUDGMENT AND ACCELERATED JUDGMENT, AND NOTICE OF HEARING, MEMORANDUM OF LAW and PROOF OF SERVICE filed by Defendants Michigan Department of State Police and Director of Michigan State Police.

Mar. 21 Before Judge Kallman on motions, taken under advisement.

May 9 OPINION (denying Defendant's Motion for Summary Judgment; granting Defendant's Motion for Accelerated Judgment as to Count II; granting Plaintiff's Motion to Consolidate) filed. Copies sent to counsel

July 11 ORDER (denying Defendant's Motion for Summary Judgment as to Count I and granting Defendant's Motion for Accelerated Judgment as to Count II) filed. True copies returned to Defendant.

Aug. 22 ORDER (joining case with Ingham County Circuit Court Case No. 78-21187-AA) filed. True copies returned to Defendant. (Mr. Weller)

Oct. 9 AFFIDAVIT AND DEFAULT filed by Plaintiff.

1981

June 16 MOTION FOR SUMMARY AND/OR DEFAULT JUDGMENT ON THE ISSUE OF LIABILITY, NOTICE OF HEARING (7-22-81) and PROOF OF MAILING filed by Plaintiff.
Amount of Claim—
MOTION FEE RECEIPT #101731

July 22 Before Judge Brown on Plaintiff's Motion, Default set aside.

July 29 ANSWER BY STATE POLICE AND DIRECTOR, STATE POLICE and PROOF OF SERVICE filed.

Dec. 23 BRIEF ON BEHALF OF DEPARTMENT OF CIVIL SERVICE AND STATE PERSONNEL DIRECTOR and PROOF OF SERVICE filed.

1982

Jan. 5 RESPONSIVE BRIEF OF THE PLAINTIFF and PROOF OF SERVICE filed.

Nov. 19 OPINION OF THE COURT filed.

Nov. 29 OBJECTION TO PRESENTATION OF ORDER and PROOF OF SERVICE filed by Defendants Department of Civil Service and State Personnel Director.

Nov. 29 NOTICE OF OBJECTION TO ORDER PROPOSED BY PLAINTIFF and PROOF OF SERVICE filed by Defendant State Police.

1983

Jan. 3 JUDGMENT (in favor of Plaintiff except as to amount of damages; Department of Civil Service and State Personnel Director dismissed as defendants) filed. True copies returned to Defendant. (Mr. Weller)

Jan. 19 NOTICE OF SETTLEMENT OF PROPOSED CONCISE STATEMENT and PROOF OF SERVICE filed by Defendant.
Amount of Claim—RECEIPT #115843

Jan. 26 Before Judge Brown on Settlement of Concise Statement, Concise Statement signed.

Jan. 26 CONCISE STATEMENT OF PROCEEDINGS AND FACTS SO FAR AS THEY ARE MATERIAL filed. True copies (2) returned to Defendant.

Jan. 26 TRANSCRIPT (of proceedings had on 7-22-81) filed.

Feb. 8 MOTION FOR CLARIFICATION OF DECEMBER 30, 1982 SUMMARY JUDGMENT (set 2-18-83), BRIEF IN SUPPORT OF MOTION and PROOF OF SERVICE filed by Defendant.
Amount of Claim—RECEIPT #116129

Feb. 17 NOTICE OF HEARING ON ISSUE OF DAMAGES (3-8-83) and PROOF OF SERVICE filed by Plaintiff.

Feb. 18 PETITION FOR ATTORNEY FEES UNDER 42 USC 1988, AMENDED NOTICE OF HEARING ON ISSUE OF DAMAGES and NOTICE OF HEARING ON PETITION FOR

ATTORNEY FEES (3-8-83) and PROOF OF SERVICE filed by Plaintiff.

Feb. 18 Before Judge Brown on Motion for Clarification.

Mar. 8 TRANSCRIPT (of proceedings had on 2-18-83) filed.

Mar. 8 Before Judge Brown for hearing on Damages. Judgment for Plaintiff.

Mar. 14 NOTICE OF ENTRY OF FINAL JUDGMENT (proposed Final Judgment attached) and PROOF OF SERVICE filed by Plaintiff.

Mar. 17 MOTION FOR CLARIFICATION OF JUDGMENT, NOTICE OF HEARING (4-13-83) and PROOF OF SERVICE filed by Plaintiff.

1983

Mar. 18 OBJECTION TO PROPOSED JUDGMENT and PROOF OF SERVICE filed by Defendant.

Mar. 18 Letter to Judge Brown (re proposed Judgment) and Proof of Service filed by Defendant.

Mar. 24 AMENDED NOTICE OF HEARING (5-4-83) and PROOF OF SERVICE filed by Plaintiff.

May 4 AMENDED NOTICE OF HEARING (5-25-83) and PROOF OF MAILING filed by Plaintiff.

May 25 Before Judge Brown on Plaintiff's Motion for Clarification, heard in part, to be continued on 7-13-83.

May 25 MOTION BY APPELLANTS FOR DISMISSAL OF APPLICATION FOR LEAVE TO APPEAL, NOTICE OF HEARING and PROOF OF SERVICE filed.

May 31 AMENDED NOTICE OF HEARING (Plaintiff's Motion for Clarification of Judgment on 7-13-83) and PROOF OF MAILING filed by Plaintiff.

July 11 TRANSCRIPT (of hearing on 5-25-83) filed.

July 13 Before Judge Brown on Plaintiff's Motion for Clarification taken under advisement.

July 18 TRANSCRIPT (of hearing on 7-13-83) filed.

Aug. 12 MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION and PROOF OF MAILING filed by Plaintiff.

Aug. 18 RESPONSE BY STATE TO WILL BRIEF OF 8-12-83 RE "CLARIFICATION" SOUGHT BY MR. WILL and PROOF OF SERVICE filed.

Aug. 18 OPPOSITION BY STATE POLICE DEFENDANTS TO PLAINTIFF WILL'S ATTEMPT TO REINSTATE A DISMISSED COUNT THROUGH MECHANISM OF "CLARIFICATION" filed.

Oct. 6 OPINION (Plaintiff's Motion to Clarify Judgment denied) filed. Copies sent to counsel and Law Library.

Oct. 14 NOTICE OF SUBMISSION OF PROPOSED ORDER and PROOF OF SERVICE filed by Defendant.

Oct. 14 NOTICE OF SUBMISSION OF PROPOSED JUDGMENT and PROOF OF SERVICE filed by Defendant.

Oct. 25 TRANSCRIPT (of proceedings had on 3-8-83) filed.

Nov. 2 ORDER (Plaintiff's Motion for Clarification denied) filed. True copies sent to counsel.

Nov. 2 FINAL JUDGMENT AS TO AMOUNT OF DAMAGES (Plaintiff granted $153,232.64) filed. True copies sent to counsel.

Nov. 15 TRANSCRIPT (of proceedings had on 3-21-79) filed.

Nov. 15 CLAIM OF APPEAL filed by Defendant.

1984

Feb. 21 CALENDAR ENTRIES filed. Copies sent to counsel.

June 4 Received Court of Appeals Order granting Motion to Affirm.

Mar. 30* Received Supreme Court Order denying application for leave to appeal prior to decision by Court of Appeals.
*out of order

1985

July 10 Court of Appeals Opinion (judgment against Department of State Police is vacated-remanded for further proceedings as to liability of the Director of the State Police, and appropriate damages if liability is found) filed./gg

July 10 Court of Appeals Order (pursuant to Administrative Order 1984-2, this panel hereby certifies a conflict to the Michigan Supreme Court; parties have 20 days from 7-9-85 to make an appropriate filing under Administrative Order 1984-2) filed./gg

Sept. 26 Supreme Court Order (application for leave to appeal granted; this case is to be argued and submitted to the Court together with Smith v State of Michigan, No. 6768, one immediately following the other; the American Civil Liberties Union Fund of Michigan's motion to file brief amicus curiae granted) filed./gg

RELEVANT DOCKET ENTRIES—COURT OF APPEALS

Date	Proceedings
1983	
Nov 14	CLAIM OF APPEAL
Nov 16	NOTICE OF FILING TRANSCRIPT
Nov 28	APPELLANTS' BRIEF
Dec 2	CLAIM OF CROSS-APPEAL FROM COURT OF CLAIMS DENIAL OF PLAINTIFF'S MOTION FOR CLARIFICATION
1984	
Jan 18	APPELLEE'S AND CROSS-APPELLANT'S BRIEF
Jan 19	MOTION TO EXTEND TIME FOR APPELLEE'S BRIEF
Jan 19	MOTION BY APPELLEE TO STRIKE CERTAIN APPELLANTS' EXHIBITS BECAUSE THEY CONTAIN ARGUMENT
Jan 19	MOTION BY APPELLEE TO EXPAND RECORD ON APPEAL
Jan 23	ANSWER BY APPELLANTS TO APPELLEE'S MOTION TO EXPAND RECORD ON APPEAL
Jan 24	MOTION SUBMITTED
Jan 27	MOTION BY CROSS-APPELLEES TO AFFIRM COURT OF CLAIMS ON CROSS-APPEAL
Jan 31	RECORD REQUESTED
Feb 1	ORDER GRANTING MOTION TO STRIKE CERTAIN OF APPELLANTS' EXHIBITS
Feb 1	ORDER DENYING APPELLEE'S MOTION TO EXPAND RECORD ON APPEAL
Feb 8	MOTION BY APPELLANTS TO SUBMIT SUPPLEMENTAL BRIEF

Feb 8	SUPPLEMENTAL BRIEF FILED
Feb 10	ANSWER TO APPELLANTS' MOTION TO SUBMIT SUPPLEMENTAL BRIEF
Feb 13	REPLY TO ANSWER
Feb 14	MOTION SUBMITTED
Feb 22	RECORD REQUESTED
Feb 24	RECORD FILED
Mar 13	ORDER GRANTING APPELLANTS' REQUEST TO FILE SUPPLEMENTAL BRIEF
Mar 28	ORDER BY SUPREME COURT DENYING SUPREME COURT BY-PASS
May 22	MOTION TO AFFIRM COURT OF CLAIMS ON CROSS APPEAL SUBMITTED ON MOTION DOCKET
May 31	NOTICED FOR OCTOBER
Jun 1	ORDER GRANTING CROSS-APPELLEES' MOTION TO AFFIRM COURT OF CLAIMS ON CROSS-APPEAL
Aug 1	MOTION BY APPELLANTS TO FILE SUPPLEMENTAL AUTHORITY
Aug 7	ANSWER BY APPELLEE
Aug 14	MOTION SUBMITTED
Aug 28	ORDER GRANTING MOTION
Oct 12	SUBMITTED ON CASE CALL
1985	
Jul 9	OPINION FILED
Jul 9	ORDER CERTIFYING CONFLICT TO SUPREME COURT
Jul 10	COURT OF APPEALS CERTIFICATE TO SUPREME COURT RE CONFLICT
Jul 12	TRANSFERRED TO SUPREME COURT

Certified Docket Entries

	PLAINTIFF'S ATTY	DEFENDANT'S ATTY
Ray, Eugene Will, Plaintiff-Appellee	Lawrence J. Emery 3401 E. Saginaw, Ste 104 Lansing, MI 48912	George H. Weller 525 W. Ottawa 600 Law Building Lansing, MI 48913

vs 76838

Dept of Civil Service and
Dept of State Police,
Defendants-Appellants

Appeal from Court of Appeals #74840
Court of Claims — Thomas L. Brown

DATE	PROCEEDINGS
1985	
July 10	Court of Appeals Certified to Supreme Court Regarding Conflict.
" 15	Application for Leave to Appeal by defendant filed.
" 15	Court of Appeals and Ct of Claims records filed.
" 19	Mich State Police brief regarding conflict filed.
" 30	Application for Leave to Appeal by plaintiff filed.
Aug 2	Answer by defendant to plaintiff's application filed.
" 9	Miscellaneous pleading—Response by cross-appellee filed.
" "	Miscellaneous pleading—Plaintiff's response to State Police Application filed.
" 13	Answer by State Police to plaintiff's response of (8/9) filed.
" 28	Motion to file brief *amicus curiae* (ACLU) filed.
Sept 10	Miscellaneous pleading—Additional Case Authority.
" 25	Ordered application GRANTED and *amicus curiae* GRANTED.
Dec 23	Plaintiff-Appellant's brief on appeal filed.
" 26	Defendants-Appellants' brief on appeal filed.

DATE	PROCEEDINGS
" "	ACLU *amicus curiae* brief filed.
1986	
Feb 7	Motion for Permission for oral argument by ACLU filed.
" 10	Defendants-Appellees brief on appeal filed.
" 11	Ordered motion by ACLU for oral argument DENIED.
" 25	Miscellaneous pleading—Reply by State Police to *amicus* motion filed.
Mar 6	Oral arguments heard and submitted.
" 11	Post Argument Motion to supplement authorities by defendant filed.
" 27	Answer to Motion to supplement by plaintiff filed.
Apr 11	Post Argument Motion to supplement citations by defendant filed.
May 16	Miscellaneous pleading—Supplement to supplemental citations filed.
Sept 22	Motion to file supplemental authorities by defendant filed.
Oct 16	Ordered defendants' motions to supplement DENIED.
Nov 10	Circuit Court record filed.
1987	
Jan 21	Ordered defendants' motion to supplement DENIED.
Aug 7	Supreme Court Opinion (Affirmed in Part, Reversed in Part, Remanded).
" 28	Motion for Rehearing by Plaintiff filed.
Sept 3	Answer to Rehearing by defendant filed.
Oct 12	Ordered rehearing DENIED.
" "	Remittitur and records returned.

DATE	PROCEEDINGS
1988	
Jan 25	Miscellaneous filing—Notice of filing petition for certiorari to US Supreme Court filed.
Apr 25	Miscellaneous filing—US Supreme Court order granting certiorari filed.

STATE OF MICHIGAN—ss.

I, Corbin R. Davis, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the docket entries in this cause; that I have compared the same with the original and that this is a true transcript and whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this *twenty-ninth* day of *April* in the year of our Lord one thousand nine hundred and eighty-eight.

/s/ CORBIN R. DAVIS
Corbin R. Davis, Clerk.

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM
File No. 78-21187-AA

RAY EUGENE WILL,
Plaintiff,

—v.—

DEPARTMENT OF CIVIL SERVICE MICHIGAN DEPARTMENT OF STATE POLICE, DIRECTOR OF MICHIGAN STATE POLICE, STATE PERSONNEL DIRECTOR,
Defendants.

At a session of the Court held at Lansing, Michigan on June 26, 1978

HONORABLE THOMAS L. BROWN
CIRCUIT JUDGE

ORDER

Defendants Michigan Department of State Police and Director of Michigan State Police having moved to remand this case for a hearing at the fourth step of the grievance procedure of the Civil Service Commission; and

The Court having considered the materials submitted by the parties; and

The Court having heard oral argument; and

The Court being fully advised in the premises; now

IT IS ORDERED that this case is remanded for a hearing at the fourth step of the grievance procedure of the Civil Service Commission. The Court retains jurisdiction to review any appeal from the decision of the Civil Service Hearing Officer as affirmed or modified by the Civil Service Commission.

/s/ THOMAS L. BROWN
CIRCUIT JUDGE

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

/s/ GEORGE H. WELLER
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Attorneys for defendants
Department of State Police and
Director of Michigan State Police
6th Floor, Law Building
Lansing, Michigan 48913
(517) 373-1330

Dated: Lansing, Michigan
June 19, 1978

Approved as to form:

/s/ LAWRENCE J. EMERY
LAWRENCE J. EMERY (P 23263)
Reid & Reid P.C.
Attorney for Plaintiff
530 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: June 23, 1978

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

/s/ VARDA N. FINK
VARDA N. FINK (P 23277)
Assistant Attorney General
Attorneys for defendants
Department of Civil Service
and State Personnel Director
300 Stoddard Building
Lansing, Michigan 48933
(517) 373-1162

Dated: Lansing, Michigan
June 26, 1978

A TRUE COPY
[ILLEGIBLE]

FILED—Nov. 10, 1978—COURT OF CLAIMS
BY GG CLERK

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

RAY EUGENE WILL, Plaintiff, -vs- DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE, Defendant.	FILE NO. 6667

COMPLAINT

Now comes Plaintiff, RAY EUGENE WILL, by his Attorneys, REID & REID, P.C., by LAWRENCE J. EMERY, and complains as follows:

COMMON ALLEGATIONS

1. Plaintiff, Ray Eugene Will, is a citizen of the United States of America and a resident of the County of Ingham, State of Michigan.

2. That Defendant, Department of Civil Service, is an agency of the State of Michigan established by both Constitution and statute.

3. That Defendant, State Personnel Director, is a Constitutional officer with responsibility for the administration of the State Civil Service Commission.

4. That Defendant, Department of State Police, is an agency of the State of Michigan created by the statutes thereof.

5. That Defendant, Director of State Police, is a State officer with responsibility for the administration of the State Police.

6. That Plaintiff is currently employed by the State of Michigan within the Department of State Highways and Transportion.

7. That Plaintiff first obtained employment with the State of Michigan on or about March, 1969.

8. That Plaintiff was originally hired as a College Trainee 07 and worked with the Department of State as a Civil Service classified employee.

9. That Plaintiff held the position of Administrative Analyst 11 in August of 1973.

10. That after taking and passing the required examination for the job of Data Systems Analyst 11 and qualifying for said classification, Plaintiff sought to obtain employment in said classification with the Michigan Department of State Police in August, 1973.

11. That during August, 1973, Plaintiff's competitive test scores ranked him as one of the top qualifiers on a merit basis for the position.

12. That on or after August 9, 1973, Plaintiff was interviewed by the Department of State Police of the State of Michigan for the position of Data Systems Analyst 11.

13. That after August, 1973, Plaintiff applied for the job of Administrative Analyst 13 with the Department of State Police, but was told prior to interview that someone else was in line for that position.

14. That on or about August 9, 1973, agents of the Michigan Department of State Police assigned to compile and keep files on persons involved in various political activities did inform the Personnel Department of the Michigan State Police that Plaintiff's brother, Charles W. Will, was a subject of surveillance and investigation by the Michigan State Police, Special Investigation Unit.

15. That information contained in the file on Charles W. Will conveyed the impression that said Charles W. Will was engaged in activity that is subversive in that it included:

a. Charles W. Will's membership in Students for a Democratic Society (SDS).

b. A description of Charles W. Will as a self-described "radical."

c. Surveillance report indicating Charles W. Will's attendance at various anti-war demonstrations at Michigan State University.

d. A hearsay statement from an unnamed informant claiming that Charles W. Will stated "that the computer center would be blown up before classes started."

e. Report indicating Charles W. Will's attendance at "Crisis In America" meetings on the campus of Michigan State University.

16. That in an Order of Judgment dated January 16, 1975, amended February 3, 1976, the Ingham County Circuit

Court, the Honorable Thomas L. Brown presiding, judicially determined that the statutory authority for the conduct of Defendants was "unconstitutional, and therefore, unenforceable, null and void." (See Amended Order of Judgment, attached as Exhibit A)

17. That Plaintiff was not the direct object of this surveillance and investigation report compiled by the Michigan Department of State Police.

18. That neither Plaintiff nor his brother, Charles W. Will, were notified that such a file was being compiled and used by Defendants until an Order to make said files available was issued by this Court.

19. That the Defendant, Michigan Department of State Police, did not seek Plaintiff's or Charles W. Will's consent for the preparation or use of said report.

20. That the information in the file compiled and kept concerning his brother, Charles W. Will, was obtained, compiled, and kept secret from Plaintiff and his brother.

21. That during the period during which Plaintiff was being interviewed for the positions described above, he was never notified that there was a file concerning his brother or that said file was being considered or used in connection with his application for employment.

22. That it was a common practice for the Special Investigating Unit to disclose the contents of their files to other administrative agencies of the State including the Department of State Police and Civil Service Commission.

23. That disclosures of the kind described in paragraph 22 were made where public employment was involved.

24. That said information was passed on to the Personnel Department of the Michigan Department of State Police without Plaintiff or his brother's consent or knowledge in August, 1973, in connection with Plaintiff's application for employment.

25. That the existence of the aforesaid file compiled and kept concerning Charles W. Will was not known to Plaintiff or his brother, Charles W. Will, until April, 1977, when said files were released by Order of the Ingham County Circuit Court.

26. That the Defendant, Department of State Police, improperly used the above described report on Charles W. Will in reviewing Plaintiff's request for employment as a Data Systems Analyst 11 and Administrative Analyst 13.

27. That after discovery of the existence and use of the file on Charles W. Will, Plaintiff filed on employee grievance under the rules of the Civil Service Commission.

28. That said grievance was denied by the Defendant, Civil Service Commission, for the reason that it was not timely. (See copy of Grievance Decision, dated 7-19-77, Exhibit B)

29. That Plaintiff thereafter appealed the decision of the hearing officer to the Defendant, Civil Service Commission.

30. That on or about November 10, 1977, the Defendant, Civil Service Commission, denied Plaintiff's "Application for Leave to Appeal." (See copy of the letter, dated 11-15-77, Exhibit C)

COUNT I

31. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 30, and further alleges:

32. That the compilation and use of the files of the Special Investigative Unit of the Department of State Police violates the civil and constitutional rights of Plaintiff in that:

a. The files themselves were compiled under a statutory scheme that violates both the United States and Michigan Constitutions.

b. That the information in those files was obtained in violation of Plaintiff's right to privacy as guaranteed by the United States and Michigan Constitutions.

c. That the information in those files was obtained in violation of Plaintiff's rights to free speech and association as guaranteed by the United States and Michigan Constitutions.

d. That the information in those files was obtained in violation of Plaintiff's political and civil rights as guaranteed by Const. 1963, Art 1, Section 2.

33. That the aforesaid compilation and use of the files of Plaintiff's brother was accomplished under color of State law contrary to 42 USC §1983.

COUNT II

34. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 33, and further alleges:

35. That Const 1963, Art XI, Section 5 guarantees that applicants for public employment or promotion shall be based on merit.

36. That by using the fact that Plaintiff's brother was the object of surveillance as a possible subversive, Defendant, Department of State Police, engaged in conduct that violates the constitutional requirement of public employment and promotion on the basis of merit.

37. That in using Plaintiff's mere association or relationship to his brother as a factor in determining his qualification for employment or promotion, the Defendant, Department of State Police, and its Director denied Plaintiff's right to due process of law and rights created under Const 1963, ART XI, Section 5.

RELIEF

38. Plaintiff hereby incorporates by reference each and every allegation in paragraphs 1 through 37, and in addition request the following relief:

39. That Plaintiff is entitled to monetary damages in an amount in excess of $10,000 representing an award for the humiliatic ridicule, and embarrassment caused by the conduct of Defendants.

40. That Plaintiff is entitled to monetary damages in an amount in excess of $10,000 representing the differential in compensation caused by failure to promote Plaintiff in 1973, including loss of seniority and longevity, and other benefits.

41. That Plaintiff is entitled to exemplary damages in the amount of $500,000.

42. That Plaintiff is entitled to such other relief as is deemed appropriate to remedy the conduct of Defendants.

WHEREFORE, Plaintiff requests:

First, compensatory damages in an amount in excess of $10,000 to reimburse Plaintiff for the differential in compensation and benefits since 1973, the lost opportunity for promotion and advancement, and for humiliation, ridicule and embarrassment due to conduct of Defendants.

Second, exemplary damages in the amount of $500,000.

Third, such other relief as this Court deems equitable and appropriate.

Ray Eugene Will /s/
RAY EUGENE WILL
Plaintiff

Dated: November 10, 1978.

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss.

On this 10th day of November, 1978, before me personally appeared the above named Plaintiff, RAY EUGENE WILL, and made oath that he has read the foregoing Complaint by him subscribed and knows the contents thereof and that the same is true to his own knowledge and belief, except as to those matters which he states to be upon information and belief, and as to those matters he believes them to be true.

Kyle Evan Cowden /s/
Kyle Evan Cowden
Notary Public,
Ingham County, Michigan
My Commission Expires:
July 18, 1982.

THIS DOCUMENT DRAFTED BY:

Lawrence J. Emery /s/
LAWRENCE J. EMERY (P23263)
Attorney for the Plaintiff
REID & REID, P.C.
530 South Capitol Avenue
Lansing, Michigan 48933

STATE OF MICHIGAN
COURT OF CLAIMS

RAY EUGENE WILL, Plaintiff, -vs- DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE, Defendants.	No. 6667

OPINION

The Court, having heard the oral arguments of counsel and being fully advised in the premises, makes the following determinations:

FACTS

On August 9, 1973, as permitted by 1950 PA Ex Sess 39 and 40, the Michigan State Police Personnel Office was advised that plaintiff's brother had a file maintained by the State Police under the provisions of 1950 Ex Sess 38, 39 and 40 (subversion).

These three statutes were declared unconstitutional by the Circuit Courts of Ingham County and Wayne County in 1976.

Plaintiff was not interviewed for a lateral transfer to the Department of State Police, apparently because of the information.

Upon learning of the 1973 action, plaintiff sought a hearing under the Civil Service grievance procedure but the hearing was denied and the denial was upheld by the Civil Service Commission.

Plaintiff then sought review in Circuit Court. Upon learning of the facts, the Attorney General on behalf of the State Police defendants sought and obtained an order from the Circuit Court directing that a grievance proceeding be held. Preparations are going ahead for the grievance hearing.

Plaintiff now seeks damages in the Court of Claims. The State Police defendants move for summary judgment and accelerated judgment.

DISCUSSION

Plaintiff has not yet exhausted his administrative remedies. A grievance proceeding has been ordered and is in the process of being organized. At the conclusion of the administrative proceedings, plaintiff may appeal to the Circuit Court of Ingham County. An action at this time in the Court of Claims is improper and accelerated judgment as to Count II is hereby granted.

SUMMARY JUDGMENT

The defendants move for summary judgment because they believe that the State Police are immune from liability.

It is a matter of fact whether or not the State Police were acting in a governmental capacity or if the State Police exceeded their authority. If the State Police were acting in a governmental capacity and did not exceed their au-

thority, they are immune. If not, it may be found that they are liable. Because there is a question of fact involved, summary judgment as a matter of law is hereby denied.

MOTION TO CONSOLIDATE

Plaintiff has moved to consolidate this matter with the case *Will* v *Department of Civil Service*, File No. 78-21187-AA, now pending in the Ingham County Circuit Court before the Honorable Thomas L. Brown. Since both this matter and the case pending in Ingham Circuit Court involve the same cause of action and the same parties, plaintiff's motion to consolidate is hereby granted.

CONCLUSION

Defendants' motion for summary judgment is denied; defendants' motion for accelerated judgment as to Count II is granted and plaintiff's motion to consolidate this matter with *Will* v *Department of Civil Service*, File No. 78-21187-AA now pending in Ingham County Circuit Court is hereby granted. Orders may be entered in conformity with this opinion.

James T. Kallman /s/
James T. Kallman, Circuit Judge

May 7, 1979

FILED—JULY 11, 1979
COURT OF CLAIMS—BY gg CLERK

STATE OF MICHIGAN
COURT OF CLAIMS

RAY ENGENE WILL, Plaintiff, v DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE, Defendants.	Docket No. 6667

ORDER

At a session of the Court held at Lansing, Michigan on July 10, 1979.

PRESENT: HONORABLE JAMES T. KALLMAN
CIRCUIT JUDGE

Defendants having moved under GCR 117.2(1) for summary judgment as to Count I because plaintiff fails to state a claim upon which relief can be granted, defendants being immune from liability; and

Defendants having moved under GCR 116.1(2) for accelerated judgment as to Count II because the Court of Claims lacks jurisdiction of the subject matter, jurisdiction being in the Circuit Court upon completion of administrative remedies; and

The Court having considered the materials submitted by counsel for all parties, and having heard counsel for all parties in oral argument; and

The Court being fully advised in the premises; and

It appearing to the Court that there is a genuine issue of fact under Count I that must be resolved before any determination can be made as to defendants' immunity from liability; and

It appearing to the Court as to Count II that after plaintiff has exhausted his administrative remedies, review may be had in the Circuit Court; NOW

IT IS ORDERED that the motion of defendants for summary judgment as to Count I be denied; and

IT IS ORDERED that the motion of defendants for accelerated judgment as to Count II be granted, and a judgment is entered in favor of defendants as to Count II.

Costs to await final determination.

/s/ James T. Kallman

countersigned
/s/ Mary Dent
Clerk

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for defendants
Michigan Department of State Police and
Director of Michigan State Police
Office Address:
7th Floor, Law Building
525 W. Ottawa
Lansing, Michigan 48913
(517) 373-8060

Dated: May 14, 1979

Approved as to form:

FRANK J. KELLEY (P 15818)
Attorney General

Robert S. Welliver /s/
ROBERT S. WELLIVER (P 23084)
Assistant Attorney General
Counsel for defendants
Department of Civil Service
and State Personnel Director

Office Address:
300 Stoddard Building
127 W. Allegan
Lansing, Michigan 48933
(517) 373-1162

Dated: May 15, 1979

Approved as to form:

Lawrence J. Emery /s/
LAWRENCE J. EMERY (P 23263)
Counsel for plaintiff
c/o Reid and Reid P.C.
500 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: June 28, 1979

A TRUE COPY—COURT OF CLAIMS
BY gg CLERK

FILED—Aug. 22, 1979—COURT OF CLAIMS
BY GG CLERK

STATE OF MICHIGAN

COURT OF CLAIMS

RAY EUGENE WILL, Plaintiff, v DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE, Defendants.	Docket No. 6667

ORDER

At a session of the Court held at Lansing, Michigan on August 22, 1979.

PRESENT: HONORABLE JAMES T. KALLMAN CIRCUIT JUDGE AND JUDGE OF THE COURT OF CLAIMS.

Plaintiff having moved to join this matter with a case arising out of the same transaction pending in the Circuit Court; and

Defendants having agreed in open court to the joinder; and

It appearing to the Court that this Court of Claims case should be joined with the case in the Circuit Court, and

The Court having issued an opinion to this effect; NOW

IT IS ORDERED, pursuant to RJA 6421, MCLA 600.6421, MSA 27A.6421, that the case of *Will* v *Department of Civil Service et al*, Court of Claims, Docket No. 6667, is joined with *Will* v *Department of Civil Service et al* Circuit Court, Thirtieth Circuit, Ingham County, File No. 78-21187-AA.

Ray C. Hotchkiss /s/
Acting

A TRUE COPY—COURT OF CLAIMS—BY GG CLERK

Notice of entry of Order Waived:

Frank J. Kelley (P 15818)
Attorney General

George H. Weller /s/
George H. Weller (P 26249)
Assistant Attorney General
Counsel for defendants
Department of State Police and
Director Department of State Police
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Dated: July 31, 1979

Notice of entry of Order waived:

Frank J. Kelley (P 15818)
Attorney General

Robert S. Welliver /s/
Robert S. Welliver (P 23084)
Assistant Attorney General
Counsel for defendants
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Dated: July 31, 1979

Notice of entry of Order waived:

Lawrence J. Emery /s/
Lawrence J. Emery (P 23263)
Counsel for plaintiff
c/o Reid and Reid, P.C.
500 S. Capitol Avenue
Lansing, Michigan 48933
(517) 482-1165

Dated: Aug. 10, 1979

State of Michigan

DEPARTMENT OF CIVIL SERVICE
HEARINGS DIVISION

Mailing Date: June 10, 1980

A GRIEVANCE DECISION

RAY EUGENE WILL HO 263-80

and

DEPARTMENT OF STATE POLICE

B – APPOINTMENT
3 – PERSONAL DISCRIMINATION
6 – PROCEDURAL DEFICIENCY
7 – PERSONAL QUALIFICATIONS

HEARING OFFICER

Samuel E. McCargo, Esq.
Hearing Officer Panel
Hearings Division

HEARINGS REPORTER

Ms. Elaine Milner
Ms. Denise Grahl, TOPS

APPEARANCES

Employee

Mr. Ray Eugene Will, Grievant
Mr. Lawrence J. Emery, Attorney
Mr. John D. Golden, Law Clerk
Mr. Walter L. Riley, Personnel Officer (retired)
Ms. Jane Martin, Data Systems Analysis Supervisor
Mr. George Lipscomb, Data Systems Analysis Supervisor

Department of State Police

Mr. George H. Weller, Assistant Attorney General
Mr. Michael Hodge, Assistant Attorney General

A fourth-step grievance hearing was held on July 21, 1979 and August 2, 1979 at the Hearings Division, Department of Civil Service, 608 South Washington Avenue, Second Floor Conference Room, Lansing, Michigan 48933.

THE ISSUE

Was denial of employment opportunity in violation of Civil Service Rules?

FACTS

This matter having been remanded to the Department of Civil Service for a fourth-step grievance hearing by the Ingham County Circuit Court, the parties and the Hearing Officer agreed that proposed findings of fact and conclusions of law would be submitted in writing at the conclusion of the hearing. In accordance with this stipulation on the record, the parties have submitted proposed findings of fact and conclusions of law. After reviewing the submissions of the parties, the hearing file in this matter and all documents and exhibits submitted in these hearings, the Hearing Officer makes the following specific findings of fact:

1. During 1970 and 1971, Grievant's brother, Charles Will, received extensive publicity, including newspaper coverage, for his anti-war activities and liberal political views.

2. During the summer of 1973, the Department of State Police was engaged in the process of interviewing and hiring employees for three Data Systems Analyst 11 positions.

3. The candidates for the above described positions came from promotional registers for Data Systems Analyst 11's and from transfer requests from Data Systems Analysts classified as 11's.

4. Grievant took the open competitive test for promotional register placement for all Data Systems Analyst 11 positions open at that time (summer, 1973).

5. Grievant's score on the promotional examination was 85.

6. The first promotional register for the Data Systems Analyst 11 positions was issued on June 8, 1973 and expired on or about July 12, 1973.

7. Grievant was ranked No. 17 on the June 8, 1973 promotional register.

8. Two Data Systems Analyst 11's were hired from June 8, 1973 promotional register; and both had higher scores than Grievant.

9. There was no promotional register effective between July 12, 1973 and August 28, 1973.

10. In anticipation of completing the selection process for the remaining vacancy in the Data Systems Analyst 11 classification, the Department of State Police continued its interview and screening process between July 12, 1973 and August 28, 1973.

11. Grievant was interviewed on or about August 6, 1973 by Mr. Walter Riley, Ms. Jane Martin, and Mr. George Lipscomb, individually.

12. During the interview with Mr. Riley, Grievant completed a "background information sheet" which was submitted to the personnel office of the Department of State Police for a background and security check.

13. During the interview with Mr. Riley on August 6, 1973 the Grievant's brother's political activities were discussed and Mr. Riley submitted this information to the Special Investigation Unit which notified the Personnel Office of the Special Investigation Unit file on Charles Will.

14. The Grievant discussed his brother with Mr. Martin during his interview with her. However, Ms. Martin does not recall if personnel advised or notified her of any security problems.

15. Mr. Lipscomb did not receive any information of any type of security problem in the Grievant's case from the Special Investigation Unit or the Personnel Office.

16. The Grievant's background information sheet was unavailable at the fourth-step grievance in this matter because, in accordance with the normal practice of the Department, it was destroyed or discarded after the selection process was complete.

17. Joint Exhibit 12 contains a record maintained by the Special Investigation Unit on Charles Will, which contains the statement; "subject's brother, Ray Eugene, D.O.B. 2-27-44, made application for employment with MSP, personnel advised 8-9-73."

18. A second Data Systems Analyst 11 promotion register was issued on August 29, 1973.

19. Grievant ranked No. 2 on the August 29, 1973 promotional register but the No. 1 candidate waived (i.e., withdrew).

20. No one was hired as a Data Systems Analyst from the August 29, 1973 promotional register.

21. The final vacancy was filled, not by promotion, but by a lateral transfer of a civil service employee already classified as Data Systems Analyst 11.

22. The No. 4 employee on the August 29, 1973 promotional register (Gene O. Miller) was offered the job as Data Systems Analysis 11, but did not accept the position.

23. Transfer requests did not appear on the promotional registers, but as a matter of practice and procedure, appeared on a separate list.

24. Security checks, except for arrest records, were normally conducted by phone during the summer of 1973.

STATEMENT OF CASE

The following documents were submitted by the parties in support of their respective positions:

Joint Exhibit 1: Cover letter and Order of Judge Thomas L. Brown for the Circuit Court of the County of Ingham remanding this case for a hearing at the fourth-step grievance procedure of the Civil Service Commission;

Joint Exhibits 2 & 3: Notices of Hearing;

Joint Exhibit 4: Letter from Mr. George L. McCargar of the Attorney General's Office regarding scheduling hearing in this matter;

Joint Exhibit 5: Letter from Mr. Marshall Burns, Grievant's Appeal's Officer, to Mr. Ray Eugene Will regarding Mr. Will's attorney's request for a prehearing conference, the unavailability of Departmental representatives for the scheduled hearing, and procedures for scheduling grievance hearings;

Joint Exhibit 6: Letter from Mr. Lawrence J. Emery, attorney for the Grievant, to Mr. Marshall Burns, Scheduling Officer, regarding grievance hearing scheduled for October 4, 1978;

Joint Exhibits 7 & 8: Notices of Hearing;

Joint Exhibit 9: Letter from Mrs. Joyce Getter, Appeals Officer to Captain Edward A. Lenon, Department of State Police regarding appellate procedures before the Department of Civil Service involving a fourth-step grievance hearing;

Joint Exhibit 10: Letter from Mrs. Joyce Getter, Appeals Officer, to Mr. Ray Eugene Will regarding appellate procedure under Section 4 of the grievance and appeals procedure of the Department of Civil Service;

Joint Exhibit 11: Hearing Officer packet containing oath of office and grievances in this matter originally scheduled before John G. Fitch;

Joint Exhibit 12: Application for leave to appeal after final decision of Hearing Officer before State of Michigan Department of Civil Service filed by Mr. Lawrence J. Emery in behalf of Mr. Ray Eugene Will with attachments;

Joint Exhibit 13: Responsive Brief in Opposition of Application for Leave to Appeal Decision of Hearing Officer filed by Mr. Earl W. James, Lieutenant, Employee Relations section, Department of State Police;

Joint Exhibit 14: July 19, 1977 Opinion of Hearing Officer John G. Fitch in the matter of Ray Eugene Will and the Department of State Police No. HO 216-77;

Joint Exhibit 15: November 10, 1977 Commission decision in the appeal of Ray Eugene Will in the matter of Ray Eugene Will and the Department of State Police No. HO 216-77;

Joint Exhibit 16: Civil Service Rule No. 1.1 Merit, Efficiency, and Fitness, and 1.2 No Discrimination;

Joint Exhibit 17: Article IX of the Constitution of the State of Michigan;

Joint Exhibit 18: Notice of Grievance Hearing;

Grievant's Exhibit 1: Letter from Mr. Neal VanderVeen, Employee Relations Officer, Department of State Police to Mr. George H. Weller, Assistant Attorney General regarding Will vs. Department of Civil Service, et al, with attachments and identification of proposed witnesses for fourth-step grievance hearing;

Grievant's Exhibit 2: Letter from Mr. George H. Weller to Mr. Lawrence J. Emery regarding access to prospective witnesses and documents relating to the matter of Will vs. Department of State Police;

Grievant's Exhibit 3: Affidavit of Mr. William D. Hassinger, Jr., dated September 22, 1975;

Grievant's Exhibit 4: Amended Order of Judgment dated February 3, 1976 from the Ingham County Circuit Court, Judge Thomas L. Brown (Human Rights Party vs. Department of State Police, et al, No. 75-17499-AA);

Grievant's Exhibit 5: Office of Criminal Justice Programs Grant Application Form No. 31-0603-CL, dated October 28, 1970;

Department Exhibit 1: Memorandum of Law by Department of State Police on burden of proof and degree of proof dated June 21, 1979.

Mr. Walter L. Riley testified regarding his responsibilities in the hiring and promotion process with the Department of State Police. He also testified regarding his recollection, or absence thereof, of Mr. Ray E. Will and his interview of Mr. Will durin_ August of 1973. The witness reviewed several documents, including Grievant's Exhibit 1 and Joint Exhibit 12 and discussed his knowledge of the contents, notations and modifications on the above mentioned documents. Mr. Riley also testified regarding his knowledge of the subversive activities investigations by the Department of State Police, the functioning of the Special Investigation Unit and the development and use of intelligence information for personnel related decisions.

Ms. Jane Martin, Data Systems Analysis Supervisor, testified regarding her employment with the State Police during 1973 and 1974. She described her duties and discussed her involvement in the selection process for Data Systems Analysts 11 during the summer of 1973. Further, Ms. Martin discussed her knowledge of the subversive activities investigations and the functioning of the Special Investigation Unit of the Department of State Police. She also testified regarding her interview with Mr. Ray E. Will and the matters she considered in making recommendations regarding Mr. Will's appointment to a Data Systems Analyst 11 position with the Department of State Police.

Mr. George Lipscomb, Data Systems Analysts Supervisor, testified regarding his supervisory authority and responsibilities over both Ms. Martin and the interview process for selection of Data Systems Analyst 11's during the summer of 1973. Though Mr. Lipscomb did not remember Mr. Will, he did recall the interview process during the summer of 1973. Mr. Lipscomb also discussed the promotional registers developed for the Data Systems Analyst position in June and August of 1973. Upon reviewing the promotional registers, Grievant's Exhibit 1, Mr. Lipscomb also provided information on the notations on the document, particularly those notations made by Mr. Lipscomb during the interview process or during phone conversations with the candidates identified on the list. Finally, Mr. Lipscomb testified regarding Mr. Will's interviews and the investigation into Mr. Will's prior experiences in the Data Systems Analyst area.

The Grievant, Mr. Ray E. Will, testified regarding his professional background and his promotional history within the Department of Civil Service. Mr. Will discussed his experiences, transfers and applications for promotions dur-

ing the month of May through June, 1973. Additionally, Mr. Will discussed his August interview for the Data Systems Analyst 11 position with the Department of State Police; this discussion included a description of the interview with Mr. Riley, Ms. Martin and Mr. Lipscomb. Finally, Mr. Will reviewed Joint Exhibit 12, and indicated that he had no knowledge of the attachment marked Exhibit A which is the subject of this grievance until 1977.

DISCUSSION

The Hearing Officer first notes that the Constitutional and Civil Service Rules provisions pertinent to this grievance are set forth appropriately in the Department's proposed findings of fact and conclusions of law at pages 6 and 7 as follows:

> "Pertinent to Grievant's assertions is the following language of Article 11, § 5:
>
> '. . . The commission shall . . . determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, . . .
>
> '. . . No appointments, promotions, demotions or removals in the classified service shall be made for . . . partisan considerations.'

Similarly, Rule 1.1 and 1.2 provide:

> '1.1 All appointments and promotions to positions in the state civil service and all measures for the control and regulation of employment in such positions, and

separation therefrom, shall be based on merit, efficiency and fitness.

'1.2 No person shall be discriminated against in seeking employment, in being appointed or promoted, in any conditions of his employment, in the state civil service, or any separation therefrom, because of race, color, religion, national origin, ancestry, or because of partisan considerations. No person shall be discriminated against in any conditions of his employment because of age or sex, except when it has been determined that age or sex is a bona fide occupational qualification.'"

Second, the Hearing Officer also notes that this entire dispute arises out of a notation set forth in Joint Exhibit 12 which appears in a record of a file maintained on Charles (Chuck) Will, on card no. 2. The notation provides as follows:

"Subject's brother, Ray Eugene, DOB 2-27-44, made application for employment with MSP. Personnel advised – 8-9-73."

Of particular note, is the date of this file reference i.e., August 9, 1973. Additionally, the Hearing Officer notes that the Grievant asserts that his personal concern over this notation is corroborated by handwritten notations on an August 29, 1973 promotional register which suggests a "security" problem with the Grievant for placement in a Data Systems Analyst II position with the Department of State Police.

Upon careful review of the file, the Hearing Officer finds that despite the Department's involvement in selection procedures for three Data Systems Analyst II positions during the summer of 1973, only one of those positions is material

to this grievance. The Hearing Officer finds, that the Data Systems Analyst II positions (two vacancies) which were filled by promoting and appointing employees from a June 8, 1973 promotional register may be relevant as background information but are not material to the resolution of the issues raised by Grievant herein. This finding is based on the fact that there is no written documentation and no testimony from either the Grievant or the Department to suggest that a security check, or security problem, or Special Investigation Unit files were in any way involved or consulted during the selection process which preceded the expiration of the June 8, 1973 promotional register.

Now, turning to the third Data Systems Analyst II position which was not filled from the June 8, 1973 register, the Hearing Officer notes that the Grievant has established a prima facie case for violations of Article XI, Section 5 of the Michigan Constitution and Rule 1.2 of the Rules of the Civil Service Commission (nondiscrimination). The Hearing Officer notes that Grievant's Exhibit 4 (Amended Order of Judgment, February 3, 1976) expressly found the practices engaged in by the Special Investigation Unit violative of the United States Constitution and the Michigan Constitution. Further, in paragraph 3 and the closing paragraph of the Amended Order and Judgment the Court acknowledges that persons who may have been targets of the special unit investigations may well have suffered injury and damage as a result of the maintainence of files under the auspices of the unconstitutional Michigan Statutes (i.e., 1931 PA 328 and 1950 Ex Session PA 38, 39 and 40). Further, Mr. Will has demonstrated that the fact that the Special Investigation Unit maintained such a file on the Grievant's brother affected the selection process in which Grievant sought a promotional opportunity. Further, two of the witnesses, i.e., Ms. Martin and Mr. Riley, acknowl-

edged discussing the matter of the Grievant's brother's political activities as a possible factor to be considered in a security check of the Grievant. Moreover, on the face of the August 29, 1973 promotional register appears written notations which, absent any rebutta clearly shows that the Grievant's promotional opportunities were impacted by security considerations. The only security questions discussed during the hearing or advanced by either party was the question of the Grievant's brother's political activities.

In the face of this prima facie case of partisan considerations involved in the selection process which could have provided a promotional opportunity for the Grievant, the Department has offered little, if any, rebuttal. Not one of the three witnesses testifying other than the Grievant, was able to state that security considerations did not play a factor in the outcome of the decision on employee selection. Further, the record reflects that numerous efforts were taken to avoid appointing the Grievant to the Data Systems Analyst 11 position. For example, the first offer of the third vacancy went to a promotional register candidate below the Grievant. Also, ultimately, rather than appoint someone from the promotional register, a lateral transfer was utilized to fill the vacancy. It should be noted that the Department's witnesses testified that lateral transfers and promotional appointments were of equal standing and priority with regard to filling vacancies. Therefore, there was no obligation to laterally transfer employees before promoting an employee to fill the vacancy.

The Department's failure to rebut the prima facie case is further demonstrated by Mr. Riley's testimony to the effect that information on security checks and checks of intelligence records were normally conducted by phone. Any supervisor involved in the selection process could call

either the Personnel Office or the Special Investigation Unit and request information. The information then would be returned by phone. Matters were further complicated by Ms. Martin's testimony to the effect that she may or may not have received or transmitted information by phone regarding Mr. Will's brother's political activities in connection with the screening and selection process for the Data Systems Analyst 11 position.

The Hearing Officer notes the testimony of both Ms. Martin and Mr. Lipscomb to the effect that neither would be cajoed or badgered into failing to recommend a candidate because of political activities of a brother or similar security concerns. Further, the Hearing Officer notes that both Mr. Lipscomb and Ms. Martin provided substantial testimony on their consideration of the background, experience, and probability of success for Mr. Will in the Data Systems Analyst 11 position. Furthermore, the Hearing Officer notes and acknowledges the witnesses' concurrence that Mr. Will was not one of the exemplary candidates in the field. Nevertheless, this testimony was not coupled with clear and convincing statements, documents or evidence of any form or fashion discounting the Grievant's brother's political activities as a substantial factor in the decision to deny Mr. Will the promotional opportunity he sought.

Therefore, the Hearing Officer finds that Michigan Constitutional Article XI, Section 5 and Civil Service Rule 1.2 have been violated. Damages, in this case, would be the measure of the difference between the salary Mr. Will earned from the date of the appointment of the employee to the third Data Systems Analyst 11 vacancy and the salary M. Will would have earned had he been appointed to the Data Systems Analyst 11 position as of that date. The

assessment of these damages shall also be subject to the normal and regular mitigation principles involved, and Mr. Will shall not be entitled to damages for periods during which he was employed at a level equal to or higher than the Data Systems Analyst 11 position for which he applied during the summer of 1973.

AWARD

Grievance granted.

Samuel E. McCargo /s/
Hearing Officer

CIVIL SERVICE COMMISSION
EMPLOYMENT RELATIONS BOARD
GEORGE E. GULLEN
AUBREY V. McCUTCHEON, Jr.
ROBERT D. BRENNER

STATE OF MICHIGAN

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF CIVIL SERVICE
Lewis Cass Building
320 S. Walnut Street, Box 30002
Lansing, Michigan 48909

RICHARD A. ROSS, State Personnel Director

MAILING DATE December 5, 1980

A BOARD DECISION

RAY EUGENE WILL — ERB 80-114

and — HO 263-80

DEPARTMENT OF STATE POLICE

B – Appointment
3 – Personal Discimination

MEMBERS PRESENT

Mr. George E. Gullen, Jr., Chairperson
Mr. Aubrey V. McCutcheon, Jr., Member
Mr. Robert D. Brenner, Member

An appeal decided in conference by the Board on December 1, 1980 with the public and parties excused.

DECISION

The Board considered the application for leave to appeal of the Department of State Police from the decision of the Hearing Officer.

Leave to appeal is denied because the Board is not persuaded that there is cause to review the Hearing Officer's award of salary differential between two 11 level classes for a period in late 1973.

This decision of the Board will be filed with the Commission and represent the final decision upon action by the Commission. You will be notified when the decision is final.

CIVIL SERVICE COMMISSION
EMPLOYMENT RELATIONS BOARD
GEORGE E. GULLEN
AUBREY V. McCUTCHEON, Jr.
ROBERT D. BRENNER

STATE OF MICHIGAN

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF CIVIL SERVICE
Lewis Cass Building
320 S. Walnut Street, Box 30002
Lansing, Michigan 48909

RICHARD A. ROSS, State Personnel Director

JAN 30 1981

FINAL NOTICE

Mailing Date: JAN 30 1981

Mr. Michael J. Hodge
Assistant Attorney General
Executive Division
7th Floor, Law Building
525 West Ottawa Street
Lansing, MI 48913

ERB 80-114
HO 263-80

RE: Ray Eugene Will

and

Department of State Police

The Civil Service Commission has received and reviewed the decision of the Employment Relations Board in this

matter pursuant to Part 3, Section 1-304 of the Employee Relations Policy.

This notice from the Employment Relations Board is to inform relevant parties that the decision of the Employment Relations Board is *FINAL*.

Any question regarding this notice should be addressed to: Employment Relations Board, 320 S. Walnut Street, Box 30002, Lansing, Michigan 48909. Contact: John R. O'Connor (517) 373-9168.

cc: Captain R. T. Davis

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Ray Eugene WILL Plaintiff, v DEPARTMENT OF CIVIL SERVICE Michigan Department of State Police, State Personnel Director, Director of Michigan State Police, Defendants.	File No. 6667 Consolidated with Ingham Circuit Court File No. 78-21187-AA

Lawrence J. Emery (P 23263)
Counsel for Plaintiff

George H. Weller (P 26249)
Counsel for Dept of State Police and Director, State Police

Robert S. Welliver (P 23084)
Counsel for Dept of Civil Service and State Personnel Director

HON. THOMAS L. BROWN (P 11303)

ANSWER BY STATE POLICE AND DIRECTOR, STATE POLICE

Defendants Michigan Department of State Police and Director of Michigan State Police, responding to plaintiff's complaint:

FIRST: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 1.

SECOND: Admit paragraph 2.

THIRD: Admit paragraph 3.

FOUTH: Admit paragraph 4.

FIFTH: Admit paragraph 5.

SIXTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6.

SEVENTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 7.

EIGHTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 8.

NINTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9.

TENTH: Admit the allegation in paragraph 10 that plaintiff sought to obtain employment in "said classification" of Data Systems Analyst II with the Michigan Department of State Police in August, 1973; and

are without knowledge or information sufficient to form a belief as to the truth of any other averments in paragraph 10.

ELEVENTH: Admit in relation to paragraph 11 that plaintiff was number 2 on the August 29, 1973 register.

TWELFTH: Admit paragraph 12.

THIRTEENTH: Are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 13.

FOURTEENTH: Admit paragraph 14, except for the word "political" which is denied, relying for support of such denial on the language of 1950 Ex Sess PA 38, 39, & 40.

FIFTEENTH: Admit the allegations in subparagraphs "c" and "e" in paragraph 15, and deny any other allegations in paragraph 15, relying for support of such denial on the "Act 40" file pertaining to Charles W. Will which plaintiff included as an exhibit in plaintiff's grievance file.

SIXTEENTH: Admit paragraph 16.

SEVENTEENTH: Admit paragraph 17.

EIGHTEENTH: Admit paragraph 18.

NINETEENTH: Admit paragraph 19.

TWENTIETH: Admit paragraph 20.

TWENTY-FIRST: Admit paragraph 21 only insofar as it pertains to the third vacancy for Administrative Analyst 11, and deny any other averment in paragraph 21, relying for support of such denial on the fact that the file had no relationship to the first two vacancies for Administrative Analyst 11.

TWENTY-SECOND: Deny paragraph 22, relying for support of such denial on the constraints set forth in 1950 PA Ex Sess 38, 39, & 40.

TWENTY-THIRD: Deny paragraph 23, relying for support of such denial on the constraints set forth in 1950 PA Ex Sess 38, 39, & 40.

TWENTY-FOURTH: Admit paragraph 24.

TWENTY-FIFTH: Admit paragraph 25.

TWENTY-SIXTH: Deny paragraph 26, relying for support of such denial on the language of 1950 Ex Sess PA 38, 39, & 40.

TWENTY-SEVENTH: Admit paragraph 27.

TWENTY-EIGHTH: Admit paragraph 28.

TWENTY-NINTH: Admit paragraph 29.

THIRTIETH: Admit paragraph 30.

THIRTY-FIRST: Defendants respond as set forth above.

THIRTY-SECOND: Deny paragraph 32, relying for support of such denial on the case of *Laird* v *Tatum*, 408 US 1 (1972), and other cases on the subject matter.

THIRTY-THIRD: Deny paragraph 33, relying for support of such denial on the fact that 42 USC §1983 is not applicable.

THIRTY-FOURTH: Defendants respond to paragraph 38 as set forth in the preceding paragraphs.

THIRTY-FIFTH: Deny paragraph 39, relying for support of such denial on the fact that plaintiff has not factu-

ally alleged, nor can he demonstrate, any "humiliation, ridicule, and embarrassment" caused by the conduct of the state police defendants.

THIRTY-SIXTH: Deny paragraph 40, relying for support of such denial on the fact that if there is any differential it is in an amount well below $10,000.

THIRTY-SEVENTH: Deny paragraph 41, relying for support of such denial on the fact that the allegations in paragraph 41 are duplicative of the allegations in paragraph 39.

THIRTY-EIGHTH: Deny paragraph 42, relying for support of such denial on the responses in the preceding paragraphs.

AFFIRMATIVE DEFENSES

THIRTY-NINTH: The Court of Claims lacks jurisdiction of the subject matter, the state defendants not being subject to suit under 42 USC §1938.

FORTIETH: Even if a state is liable to suit under 42 USC §1983, it is immune from punitive and exemplary damages under 42 USC §1983.

FORTY-FIRST: If by some extreme interpretation it could be considered that the action against the "Director of Michigan State Police" is an action against an individual, then this Court of Claims lacks jurisdiction as actions in the Court of Claims may be had only against the State, not against individuals.

FORTY-SECOND: State police defendants are immune from liability because they were engaged in the exercise or discharge of a governmental function.

FORTY-THIRD: Judicial policy forestalls a double recovery for an injury.

WHEREFORE: State Police defendants pray that this court dismiss this action against them.

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for "Michigan Department of State Police: and "Director of Michigan State Police."
793 Law Building
525 W. Ottawa
Lansing, Michigan 48913
(517) 373-8060

Dated: July 27, 1981

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

RAY EUGENE WILL, Plaintiff, v DEPARTMENT OF CIVIL SERVICE, MICHIGAN DEPARTMENT OF STATE POLICE, STATE PERSONNEL DIRECTOR, DIRECTOR OF MICHIGAN STATE POLICE, Defendants.	Circuit Ct. No. 78-21187-AA Consolidated with Court of Claims No. 78-6667

OPINION OF THE COURT

In these matters Plaintiff, Ray Eugene Will, seeks damages under 42 USC 1983, the United States Constitution and the state constitution for the use of a file maintained under 1950 PA Ex Sess 38, 39 and 40 on plaintiff's brother in a 1973 State Police employee promotion process. The maintenance of such files were found by this Court to be unconstitutional on February 5, 1976, in the case of *Human Rights Party* v *Department of State Police*, File No. 75-17499-AA, and the file on Plaintiff's brother was released.

Plaintiff's complaint alleges that in 1973 he sought a position as a Data Systems Analyst II with the Department of State Police. In 1977 Plaintiff discovered that the Department of State Police denied Plaintiff the opportunity for promotion based on information on Plaintiff's brother contained in a so-called red squad file.

Plaintiff filed an action in the circuit court after being informed by a hearing officer, as affirmed by the Civil Service Commission, that the grievance should have been filed in 1973. This Court granted the request of counsel for the Defendant, Department of the State Police, that a hearing before a Civil Service Hearing Officer be granted. The Court retained jurisdiction to review any appeal from the Civil Service Commission.

The Civil Service Commission affirmed the Hearing Officer's finding that the Department of State Police used "partisan considerations" of Plaintiff's brother's political activities in violation of the Michigan Constitution 1963, Art XI, §5 and the Civil Service Commission Rule 1.2. The Civil Service Commission also affirmed the measure of damages of $201.60 set by the Hearing Officer.

Plaintiff does not seek review of this decision but maintains that he is entitled to a summary judgment of liability against the State of Michigan, Department of State Police, and its Director, based on the adjudication of the Hearing Officer. Plaintiff maintains that this adjudication provides sufficient factual basis of a violation of Plaintiff's federal civil rights under the Civil Rights Act of 1871, 42 USC §1983.

The violation of state law by a state official of itself is insufficient to state a violation of a federal right. Section 1983 of the Civil Rights Act of 1871 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Under this section, liability is imposed on any "person" who deprives another person's federally protected rights. Such rights have been construed by the courts to include the protection of life, liberty and property under the Fourteenth Amendment of the Federal Constitution. It is Plaintiff's position that the Due Process Clause protects his property right as a public employee to fair treatment.

Plaintiff argues that the State having established a system of merit, [under Michigan Constitution 1963, Art 11, §5] the denial of plaintiff's promotion based on Plaintiff's brother's political persuasion violates due process. The Court agrees. It was expressed in *Perry* v *Sinderman*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972), that a "person's interest in a benefit is a 'property' interest for due process purposes if there are. . .rules or mutually explicit understandings that support his claim of entitlement to the benefit. . ." In this case there is no dispute that Plaintiff's competetive test scores ranked him as one of the top qualifiers on a merit basis for the position of Data Systems Analyst II. (Department of Civil Service Grievance Decision, dated June 10, 1980, p 3)

The issues presented before this Court are whether the state is a person within the meaning of §1983 and whether the 11th Amendment provides a bar to the award of damages out of a state treasury.

In both Circuit Court and the Court of Claims actions, Plaintiff seeks exemplary damages in addition to compensatory damages against the State of Michigan, Department

of State Police, and state officers in their official capacity. In these cases the State of Michigan is the real party.

The United States Supreme Court in *Monell* v *Department of Social Services of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 6 (1978), held that a municipality is a "person" under 42 USC §1983. However, whether state agencies and state officials are "persons" under §1983 has not been settled by the United States Supreme Court. The lower federal courts are divided on this issue.

This Court relies on the cases of *Marrapese* v *State of Rhode Island*, 500 F Supp 1207 (DRI 1980) and *Weisbord* v *Michigan State University*, 495 F Supp 1347 (WD Mich 1980). In *Marrapese*, *supra* at 1212, the court concludes that:

> ". . .the states are 'persons' potentially liable for constitutional deprivations inflicted through official custom and policy, but that, because Congress has not exercised its §5 powers to abrogate Eleventh Amendment immunity, each state must consent to the imposition of such liability. This interpretation allows victims of unconstitutional activity the largest possibility for redress, while exacting little cost in terms of federalism. Because there is no forced waiver, each state maintains ultimate control over its own potential liability. . . [footnote omitted] Moreover, this interpretation is consistent with earlier cases in which the Supreme Court seems to have assumed that a state could consent to §1983 liability. See, e.g., *Alabama* v *Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978) (per curiam); *Edelman* v *Jordan*, 415 U.S. at 671-74, 94 S.Ct. at 1358-1359. Therefore, this Court holds that Rhode Island is a "person" within the meaning of §1983."

In *Weisbord*, *supra*, the court held that Michigan State University is a "person" under the terms of §1983. In his opinion Judge Gibson stated:

> "While the Supreme Court was not faced with the issue of whether agencies of a state are "persons," the legislative history and the rationale of that opinion is highly persuasive as to state agencies as well. This Court is of the opinion that these defendants are "persons" within the meaning of 42 U.S.C. §1983. Plaintiff's §1983 claims, therefore, will not be dismissed on this basis."

Having determined that the Michigan Department of State Police and its Director, in his official capacity, are "persons" under 42 USC §1983, this Court will address the issue of whether the 11th Amendment of the United States Constitution bars an award of monetary relief against state agencies.

The recent United States Supreme Court decisions hold that under the 11th Amendment federal courts lack jurisdiction over states or their agents in their official capacity. *Alabama* v *Pugh*, 438 US 781; 98 SCt 3057; 57 L Ed 2d 522 (1978); *Edelman* v *Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974); *Quern* v *Jordan*, 440 US 332; 59 L Ed 2d 358; 99 S Ct 1139 (1979), reaffirms the holding in *Edelman*, *supra*, that §1983 does not abrogate the immunity of the states under the 11th Amendment. The court in *Edelman* held that a "retroactive award which requires payment of funds from the state treasury" violates the 11th Amendment.

The 11th Amendment states:

> "The Judicial power of the United States shall not be

> construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This amendment guarantees immunity to the states from suit in the federal courts. It has been recognized that a state's consent to be sued in its own court does not necessarily imply consent to be sued in federal courts. As pointed out by Defendants, without the consent of the State, the State cannot be sued under a federal law in a state court if it cannot be sued under the same federal law in a federal court. In *Marrapese* the Court found that a suit may be maintained against the State of Rhode Island because it waived its immunity from suit. In reaching that conclusion the court quoted the standard of *Johnson* v *Zerbst*, 304 US 458, 464, 58 S Ct 1019; 82 L Ed 1461 (1938), that there must be an "intentional relinquishment or abandonment of a known right or privilege."

Implicit in the creation of the Court of Claims under MCLA 600.6404; MSA 27A.6404, "[t]o hear and determine any claims or demands based on 'ex contractu or delicto'" MCLA 600.6419; MSA 27A.6419 is a waiver of the Eleventh Amendment rights. However, the court in *Brown Brothers Equipment Co* v *State of Michigan*, 266 F Supp 506 (DC 1967), stated that the Michigan Court of Claims Act, MCLA 600.6401 *et seq;* MSA 27A. 6401 *et seq*, did not constitute a consent to a suit against the state by a private citizen in federal courts. This Court, therefore, concludes that nothing less than an express waiver of the 11th Amendment rights is necessary for the state to consent to be sued in the federal court, and thus in the state court. In the Court of Claims Act, the State of Michigan waives its sovereign immunity from suits in its own courts, not in the federal courts. Thus, as expressed in *Brody* v *Leamy*, 90 M2d 1;

393 NYS2d 243, 262 (Dutchess Cty 1977), cited by Defendants:

> "By virtue of the Eleventh Amendment no cause of action exists in any court of this state. This is so because by a parity of reasoning, while the Eleventh Amendment in itself is not applicable in state courts, since no federal cause of action could exist in federal court, none can be brought in state court."

This Court, therefore, concludes that Plaintiff's cause of action against the Defendant, Michigan Department of State Police and its Director in his official capacity under 42 USC §1983 in the circuit court action should be dismissed. However, this Court is of the opinion that by the general provision "[t]o hear and determine any claims or demands" based on "ex contractu or ex delicto," MCLA 600.6419; MSA 27A.6419, the State of Michigan consented to be sued in the Court of Claims on an action under 42 USC §1983. [The Court of Claims has exclusive jurisdiction over money damages against state agencies and state officers acting within their official capacity. *Paquin* v *Northern Michigan University*, 79 Mich App 605, 607; 262 NW2d 672 (1977)] Therefore, the Court grants Plaintiff's motion for summary judgment under his Court of Claims action against Defendants, Michigan Department of State Police and its director, on the issue of liability. Plaintiff may present proofs on the issue of damages in this matter.

An order may enter consistent with this opinion.

Thomas L. Brown /s/
THOMAS L. BROWN, CIRCUIT
JUDGE and COURT OF CLAIMS

DATED: November 15th, 1982.

A TRUE COPY—CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

FILED—JAN. 3, 1983—BY gg CLERK

STATE OF MICHIGAN

COURT OF CLAIMS

Ray Eugene WILL Plaintiff, v DEPARTMENT OF CIVIL SERVICE, Michigan Department of State Police, State Personnel Director, Director of Michigan State Police, Defendants.	No. 78-6667

JUDGMENT

At a session of the Court held at City Hall, Lansing, Michigan, on Dec. 30th, 1982.

PRESENT: HONORABLE THOMAS L. BROWN (P 11303) JUDGE OF THE THIRTIETH JUDICIAL CIRCUIT

Plaintiff having moved on June 15, 1981 for Summary Judgment in his favor because, except as to the amount of damages, there is no genuine issue as to any material fact and he is therefore entitled to judgment as a matter of law; and

The Court having considered the materials submitted by the parties, having heard oral argument, and being fully advised in the premises; and

It appearing to the Court that there is no genuine issue as to any material fact and the plaintiff is therefore entitled to judgment as a matter of law:

IT IS ORDERED that, for reasons given in the Court's Opinion of November 15, 1982, Judgment be, and it hereby is, entered in favor of plaintiff, except as to the amount of damages; and

IT IS ORDERED that the Department of Civil Service and State Personnel Director are dismissed as defendants.

Thomas L. Brown /s/
JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

Countersigned:
Grace E. Gott /s/
Clerk, Court of Claims

NOTICE OF ENTRY OF ORDER WAIVED:

LICK, EMERY AND DEVINE
Counsel for plaintiff

By: Lawrence J. Emery /s/
LAWRENCE J. EMERY (P 23263)
A member of the firm
310 Business and Trade Center
200 Washington Square North
Lansing, Michigan 48933
(517) 482-0222

Dated: Dec. 29, 1982

NOTICE OF ENTRY OF ORDER WAIVED:

George H. Weller /s/
GEORGE H. WELLER (P 26249)
Assistant Attorney General
Counsel for defendants
Michigan Department of State Police
and Director of Michigan State Police
793 Law Building
525 W. Ottawa
Lansing, Michigan 49813

Dated: December 29, 1982

NOTICE OF ENTRY OF ORDER WAIVED:

Robert S. Welliver /s/
ROBERT S. WELLIVER (P 23084)
Assistant Attorney General
Counsel for defendants
Department of Civil Service
and State Personnel Director
Plaza One Building, Suite 3
Lansing, Michigan 48913
(517) 373-1162

Dated: December 30, 1982

STATE OF MICHIGAN
COURT OF CLAIMS
Case No. 6667

RAY EUGENE WILL,

Plaintiff,

—v.—

DEPARTMENT OF CIVIL SERVICES,

Defendant.

PROCEEDINGS had and testimony taken in the above-entitled cause before the HONORABLE THOMAS L. BROWN, Circuit Judge, on the 8th day of March, 1983, at Lansing, Michigan.

APPEARANCES:

LAWRENCE J. EMERY, ESQ.,
Attorney at Law,

Appearing on behalf of the Plaintiff;

GEORGE H. WELLER, ESQ.,
Assistant Attorney General,
State of Michigan

Appearing on behalf of the Defendant.

ALFRED G. JOHNSON, CSR-284
Official Court Reporter
Thirtieth Judicial Circuit
Ingham County, Michigan

THE COURT: Well, the Court in a bench trial is in a little bit different position than a jury determining damages in a jury room.

The Court's obligated as counsel knows to place its reasons, its finding of fact and conclusions of law on the record.

It's obvious to the Court that Mr. Will applied to this opportunity with the State Police in 1973, that the State Police had knowledge of the activities of the brother. The record is clear that the State Police used that knowledge. It's not clear that that prevented Mr. Will from receiving employment opportunity, but it is clear that it could have. It was a very distinct possibility.

And, Mr. Will accordingly has a justifiable grievance. It is a matter which the State Police should not have used in any fashion, should not have been aware of, should not have been in possession of, should not have used, even the—the barest innuendo should not affect Mr. Will's opportunity for employment, because what was the—we have Mr. Will who is, as far as the Court is able to determine, a conservative political individual. And, no one is claiming that he is the right of Mr.—to the right of Mr. Buckley. But, he is at least in that spectrum of the political scale.

And, his brother apparently is not on the spectrum. That is his brother's choice. That is Mr. Will's choice, a choice which persons in this country are free to make.

The courts and governments are not permitted, pursuant to our Constitution and our way of life, to indulge in determining someone's worth or value simply because of their political beliefs. And, we have other reasons the ones who—the work habits, if you will, as Mr. Weller has pointed out, whether one of—one is personality, one is ability, one is attainment, serious education; those are the important matters, not whether one believes in the Vietnam War, or is a political activist.

I suppose everyone due to the Red Squad era that was opposed to the Vietnam War was branded a Communist, or a Communist sympathizer or a pink coat, or something of that nature.

I read, as Mr. Weller pointed out, a good many of those Red Squad files, ones that because of the case I had here that were sent here by the State Police pursuant to the Court's order and the inquiry of persons who were interested, and also—it was apparent that there was a scare at that time, that the Communist

scare, if you will, and the government thought there was a legitimate reason for monitoring the activities of the individuals who were interested in being opposed to what the majority of the people were in favor of, if you will, through their elected representatives and so on and so forth.

And so they gathered information. That information they gathered boggled the minds.

I was in the Red Squad files, for example. The Red Squad files revealed that I was at a union Baptist Church on a certain date speaking in favor of open housing and that—and that along with Representative Lyons, with these individuals from that point to the Capitol Building. I guess that made me a Communist by virtue of that fact that I was in favor of open housing.

It really boggled the mind why the State Police would be interested in that particular gathering which was peaceful in all—for all intents and purposes. I was sent there as an emissary of Governor Romney, who asked me from the Governor's Office to attend that meeting. It was in my district. Why the State Police had an interest in monitoring activities of myself, Representative William Ryan, I don't—I fail to see. I fail to see. I don't know what that had any—I didn't know it until later, and I have no way of knowing whether it had any effect on my life at that time, whether it was the State Police because of that, or other persons who monitored my activities further, I have no way of knowing.

But, that one incident is enough to convince me that the pursuit was irrational. It was based upon no standards; simply done. No—no one can blame the State Police. It was simply done because the law was—law was ridiculous—ridiculous, and stupid in its whole purpose. Very little, or little purpose.

Now, I would have to say honestly that some of the persons monitored were dangerous individuals. Quite obviously from the reports that we received. There were groups known as Black Panthers. There were other groups, groups like the Weathermen, groups like that that did pose a threat, I think, from what I was able to develop from reading the files, who threatened the government, and was a threat to our security. And so the State Police had some interest in it, the FBI, and other individuals, in

monitoring the activities of persons such as that who were making bombs and distributing information how to make bombs, and things of this sort, and how to disrupt, and so on and so forth.

So there was some legitimacy to the activities. But, I think the law was ridiculous to the extent that it was—there was a standard to what the State Police were to do. So, to a great extent they are not to be blamed for what went on. They were simply, if you will, carrying out orders. But, so was Eichmann, and others merely carrying out orders.

So, there's no question that Mr. Will's life was disrupted. We will never know whether he would have made it as a—as a data processing analyst, analyzer or whatever, with the State Police, or that position he would have sought would have even been offered him absent that information. There's no way of knowing. The only thing we can assume is that the information was improper, inappropriate and he didn't get the job. So, there is every reason to believe that it entered into the State Police's consideration. As Mr. Weller said, it was the State Police who are security conscious, and they should be. They shouldn't be hiring persons who are going to divulge the information they have in their files. They are going to be very circumspect about the way they handle their job in sensitive matters. Certainly they should be interested in—in security when you hire someone. And I think that's—that reason gives us every reason to believe, or that attainment by the State Police gives us every reason to believe that simply they rejected Mr. Will because of this brother's activities, and for no other reasons.

So, the Court is clearly convinced that he was denied the possibility, which is the only thing we really have to deal with. We can't—we determine damages. That's the best you can do. You can only arrive at some—some conclusion by applying information in the best way possible in respect to the evidence as the Court has received it.

This knowledge that they had was a detriment to Mr. Will. This knowledge they had was available to them because of the state's activities in passing the law, in fomenting the state police to gather the information which they used.

Now, Mr. Weller points out Governor Williams, a known very liberal-minded individual, at least until he became a Supreme Court Justice—I'm not sure if his liberal trend is—what it is today. He seems to have become more conservative. But, the record just reflects that Governor Williams at that time was known by most people to be a fairly liberal individual. And if Mr. Weller is correct, and I assume that he wouldn't make that statement unless he felt there would be some good belief and knowledge and information, Governor Williams was the force behind the drafting and the passing of the so-called Red Squad legislation, subversive activities legislation. And there must have been a scare. There must have been some good and cogent reason for doing it. The State did it, and it turns out they—it was incorrect. They should have had better standards. The legislation should have been more precise, or the State Police should have been—said "Well, look, we got this legislation. We've got this duty to perform. Let's see if we can't perform it in some responsible fashion. Let's not sally-forth and depend on ambiguous language to give us immunity forever."

They could have developed standards like "Look, we will only investigate standards of those organizations which are interested in disrupting the constitution authority. We are not interested in persons who are protesting, persons who are marching in favor of good things like open housing, persons who are interested in questioning the Government implications and involvement in Vietnam, and things of that sort."

It turned out we shouldn't ever have been in Vietnam. It turns out that open housing was a good idea. So, the State Police, they didn't develop the standards. They just simply blindly followed the law, and so they are at fault.

The State is at fault for having passed it. So, we have state action involved. We have the state involved in being unfair to an individual in our society.

Now, Mr. Will indicated that once he found this out, once it was revealed to him that his brother was in the Red Squad files, and in that file was an indication that that knowledge was a consideration taken into account by the State Police when he arrived for employment, that he became distressed. He didn't believe it. He said he was very mad. He was disgusted. He is still

disgusted. And, quite frankly, I would be disgusted, too, if that was a reason for—the only reason, apparent reason for denial of employment opportunity.

He filed a grievance, as he indicated. He indicated that he—and the proofs are not to the contrary, he indicated that he desired this employment with the State Police, challenging—it appeared to be a challenging job, appeared to be of great interest. The State Police is a stable employer and so on and so forth. Many reasons for wanting to apply and obtain the opportunity.

His wife testified that he has changed since the revelation of the information. She remembers when he applied for the opportunity and his reactions at that time was along the lines that they—the employer, the employer State Police, whoever—whoever interviewed him was just going through the paces. And later he found out, when he found out about the Red Squad matter, he became—it became clear to him that they were doing—performing here simply because he had applied. And, he was qualified, and a—and they had to do it. They hushed up the information, the background information.

She indicated that he, since that time, his personality has changed to some extent. He has become snappy. I guess that is short of temper, if I understand the term correctly; not as patient as one perhaps should be. Less willing to go with the punches, if you will. Different than his normal patient attitude. That he is losing sleep since this time. That fellow employees seem to sense he's commenced this grievance procedure and this lawsuit. That the fellow employees have lost interest in being acquainted with him, or being in company with him.

Mr. Weller presented certain witnesses to us which would indicate, and it is the Court's opinion that there was never reason to believe that Mr. Will did lose an employment opportunity. It is indicated here he was—he was average employee. He did not show promise. But, I haven't heard anything presented here that the State Police job required anything other than the average employee of normal promise. It appears that the—appears that he qualifies for that employment. And the fact that he is an average employee of normal promise, that's not a way contra to his ability to obtaining employment.

There's some indication that his personal habits, work habits, doesn't get things done on time—I guess I could be accused of that. It all depends on how much work one has to do. There is no indication that he is lazy or doesn't—doesn't appear at work, or misses a lot of work, or is constantly absent, takes more vacations that he should, and things of that sort. From all I know he is a good employee.

Mr. Heilman testified here. He says that he recommends him with potential of performing at a higher level. His major areas of expertise is financial accounting, and his capacity to be a valuable employee.

Now, maybe Mr. Heilman regrets that he's written a letter of recommendation. I don't know. He didn't say that he did. But, that is what he said. If he didn't mean it he ought to tell us. Apparently he meant it.

Mr. Storie indicated that he had on one occasion threatened to fire Mr. Will, but that was—that was a long time ago. He was a lot younger.

The Court feels in the matter of damages, I am not going to set forth these damages separately, gentlemen, so that if you desire to appeal the Court's judgment in the matter, you can, of course. You may do that. Set that up separately any way you wish.

As to the wage loss, a small amount, somewhat more than what has been awarded to Mr. Will up to this point. But, the indications are that he—the indications are that if it has benefit it has every possibility, if it is proper, and the Court awards him his request of $584.64 for lost wages.

The transportation item, the Court awards nothing for that. Mr. Will could have lived anyplace. It's very difficult to posture damages based upon where one lives, especially as a minor matter of only four miles. So that's diminimous, really.

The Court denies any damages for transportation.

The income taxes, as Mr. Weller points out, the state government is located in the city of Lansing, and frequently persons are transported, and are transferred, and whatever, into the city of Lansing. And, you end up working here anyway. No matter where they are. I know there are some in Windsor Township, and Eaton County now. But, there is every indication they are

going to move them back into Lansing. I don't know. You can't really tell what the Legislature will decide to do. Any day they may change their mind. And, if the representatives take a fancy, they can move everybody back into Lansing. So, the State Police could be back in here, and they could all be paying income tax. So, the Court rejects the claim for income tax.

The Court does award to Mr. Will, for career loss, and this is an amount of money adjusted to present value, of $40,544.

And, the Court does award Mr. Will for emotional distress—let me get the figures, and this is a sum reduced to present value, $56,052.

And, the Court does award to him separately, as a separate item for exemplary damages, the equal sum of $56,052. That is the sum reduced to present value.

All right. Judgment may enter for the amounts indicated. That way, if the Court is wrong in awarding exemplary damages, I am sure that the State of Michigan, Supreme Court or whatever, or the Sixth Circuit Court of Appeals, federal, will tell me.

But, at least they are set forth separately, Mr. Weller, so that you can bring up that particular matter by separate brush. All right.

MR. EMERY: Thank you, your Honor.

THE COURT: Anything else, Mr. Emery?

MR. EMERY: Nothing. I do have a petition for attorney fees, but I don't think it's appropriate at this time to, since it's not going to—

THE COURT: Yes. Yes. Take up that—take that up with the taxed costs.

MR. EMERY: Thank you, your Honor.

THE COURT: Will you prepare the order, then, Mr. Emery?

MR. EMERY: Yes. I will prepare the judgment. Yes, your Honor.

THE COURT: All right. And you want me to keep the exhibits?

MR. EMERY: Yes, your Honor.

THE COURT: So that I have all of them? I have A from Mr. Weller, and 1, 2, 3 from Mr. Emery.

MR. EMERY: That is correct, your Honor.

THE COURT: That's it. All right. Thank you, gentlemen.

MR. EMERY: Thank you, your Honor.

(Whereupon, at or about 12:10 o'clock in the afternoon, court was in recess.)

FILED—NOV 2 1983

COURT OF CLAIMS—BY GG CLERK

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Ray Eugene WILL, Plaintiff, v. DEPARTMENT OF CIVIL SERVICE, and State Personnel Director, (dismissed) Defendants, and Michigan Department of State Police, and Director of Michigan State Police, (remaining) Defendants.	No. 6667

FINAL JUDGMENT
AS TO THE AMOUNT OF DAMAGES

At a session of the Court held at the City Hall, Lansing, Michigan on October 25, 1983.

PRESENT: HONORABLE THOMAS L. BROWN
(P 11303) JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

The Court having entered Judgment in favor of plaintiff on December 30, 1982, except as to the amount of damages, for the reasons given in the Court's Opinion of November 15, 1982: and

The Court having on March 8, 1983 tried on the facts the matter of damages and having on the record from the bench found the facts specially and stated separately its conclusions of law:

IT IS ORDERED AND ADJUDGED that the plaintiff recover from the remaining defendants the following sum as and for damages, which represents the present value of the damages incurred, together with costs to be taxed:

1.	Wage Loss	$ 584.64
2.	Loss of career opportunities	$40,544.00
3.	Emotional distress and mental anxiety	$56,052.00
4.	Exemplary damages	$56,052.00
5.	Transportation costs	nothing
6.	City of Lansing Income Tax Differential	nothing

THOMAS L. BROWN /s/
JUDGE OF THE THIRTIETH
JUDICIAL CIRCUIT

Countersigned:

GRACE E. GOFF /s/
Deputy Clerk, Court of Claims

No. 87-1207 (5)

Supreme Court, U.S.
FILED
[illegible] 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAY WILL,

Petitioner,

—v.—

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a state or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. § 1983?

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IN THE

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OCTOBER TERM, 1987

No. 87-1207

RAY WILL,

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—v.—

MICHIGAN DEPARTMENT OF STATE POLICE and
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Respondents.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN SUPREME COURT

BRIEF OF PETITIONER

PARTIES

The petitioner in this Court is Ray Will, who was the plaintiff in the proceedings below. Respondents are the Michigan Department of State Police and the Director of Michigan Department of State Police. The Michigan Department of Civil Service and the State Personnel Director were dismissed as defendants by the trial court (*see* p. 12a of Appendix to Petition of Certiorari), but continued to be carried on the caption of the case in the Michigan Court of Appeals and Michigan Supreme Court below.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported *sub nom. Smith v. Department of Public Health, Will v. Department of Civil Service*, 428 Mich. 540, 410 N.W.2d 749 (1987), and is reprinted in the Appendix to the Petition for Certiorari at 1a.

The opinion of the Michigan Court of Appeals is reported *sub nom. Will v. Department of Civil Service*, 145 Mich. App. 214, 377 N.W.2d 826 (1985) and is reprinted in the Appendix to Petition for Certiorari at 124a.

JURISDICTION

The jurisdiction of this Court to review the opinion and judgment of the Michigan Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1950, the Michigan legislature passed a statute premised on a legislative declaration "that the governments of the United States and of this and other states of the United States are threatened by attempts to overthrow existing government by

force and violence." Michigan Public Act 38 of 1950 (Extra Session), Section 1 (Appendix to this Brief at 1a).[1] To accomplish the express statutory purpose "to maintain, preserve and strengthen our established form of government," *id.*, the Michigan legislature declared a wide range of advocacy activities to be felonies and imposed the following duty on the state department of police: "The state police *shall* collect information and evidence relating in any manner to activities prohibited by this act." *Id.*, Section 3(c), Br.App. 3a (emphasis added). A companion piece of legislation gave the Commissioner of State Police authority to accomplish this mandate:

> The commissioner of the Michigan state police is authorized to establish within the department of the Michigan state police a division to be known as the subversive activities investigation division . . . .
>
> The duties of the subversive activities investigation division shall be to investigate activities within the state that are subversive of state or federal government [and] to obtain and compile information concerning such activities . . . .
>
> The commissioner shall have power to maintain in the subversive activities investigation division confidential files of information on activities that are subversive of government . . . [and] the commissioner may furnish information contained therein . . . to the responsible heads of any agency having charge of employment by the state . . . .
>
> The term "subversive activities" as used in this act shall be construed to mean and include criminal syndicalism as it relates to political reform only . . . .

Michigan Public Act 40 of 1950 (Extra Session), Sections 1, 2, 3(a), and 5. Br.App. 7a. This companion legislation specifically

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1 Hereafter, the following abbreviations will be used to refer to the Appendices: J.A. will refer to pages in the Joint Appendix, Br. App. will refer to pages in the Appendix to this Brief, and Pet. App. will refer to pages in the Appendix to the Petition for Writ of Certiorari.

incorporated the definition of "criminal syndicalism" used in a 1931 Michigan statute, *see* Michigan Public Act 328 of 1931, which stated: "[C]riminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony." Br. App. 8a.[2]

Pursuant to these and other Michigan statutes, the Michigan state police department for 25 years operated a "special investigations unit"—widely known as the "Red Squad"—which carried on surveillance of a wide variety of political activist organizations, including civil rights and anti-war groups. In 1976, judgments were issued in two separate state court actions against the Michigan Department of State Police, declaring these statutes "unconstitutional on their face in violation of the Michigan and United States Constitution" and ordering the state police to disband its special investigations unit. Br. App. 10a-11a and 12a-13a. As part of the ancillary relief, the state police were directed to release their confidential surveillance files to the individuals who were the subject of those files.

This case arises from that successful vindication of the United States Constitution in the courts of Michigan. Petitioner never engaged in any political activity that would gain him the attention of the "Red Squad." He is a computer analyst and an exemplary state employee since 1969. However, the "Red Squad" maintained a file on petitioner's brother, Charles, who was a student activist during the 1960s in the anti-war movement at Michigan State University.

In the latter half of 1973, petitioner sought opportunities to advance to data systems analyst 11; one of these opportunities arose within the Michigan Department of State Police. Petitioner ranked number two on the promotional register and the

2 Another section of this 1931 statute provided that "any person who shall display a red flag in any public assembly, parade or demonstration in this state is guilty of a felony." Michigan Public Act 328 of 1931. Br. App. 9a.

number one candidate withdrew. Nevertheless, petitioner was not promoted. The reason petitioner did not get the position—unknown to him at the time—was that the state police found that it had a "Red Squad" file on petitioner's student activist brother, Charles. Duly recorded in Charles Will's file was the notation: "Subject's brother Ray Eugene DOB 2-27-44 made application for employment with MSP. Personnel advised 8-9-73." Petitioner knew nothing of this until 1977, when his brother Charles obtained his "Red Squad" file pursuant to the state court orders discussed above. Pet. App. 11a.

When petitioner learned that he had been denied the position because of the "Red Squad's" secret file on his brother Charles, he filed lawsuits against the respondents in the Circuit Court of Ingham County (a court of general jurisdiction) and the Michigan Court of Claims (a court possessing jurisdiction over claims against the state of Michigan), claiming violations of his rights under the Michigan and federal constitutions and relying for the latter claims on 42 U.S.C. § 1983.[3]

The cases were consolidated for trial. Pet. App. 11a-13a. In 1982, after a bench trial consisting of an agreed record and a damages hearing, Judge Thomas L. Brown rendered decision on petitioner's § 1983 claim for both the Ingham County Circuit Court and the Michigan Court of Claims.[4] He determined that the state of Michigan was the real party in interest and that the respondents Michigan Department of State Police and its director, sued in his official capacity, were "persons" within

3 The Court of Claims was created by the Michigan legislature to exercise exclusive jurisdiction over claims against the state of Michigan, its departments and agencies. Br. App. 17a. An individual may not be sued in the Court of Claims except in his or her official capacity as a state official.

4 At the time of this litigation the general jurisdiction court for the county where the state capital is located, the Ingham County Circuit Court, served a dual function as the Court of Claims. Thus, the trial judge, Thomas L. Brown, wore two "hats" in this case: as a circuit court judge and as a judge of the Court of Claims. Judge Brown was also one of the two state court judges who had declared the Acts of 1950 unconstitutional, and so was fully familiar with the operations of the "Red Squad."

the meaning of § 1983. Pet. App. 14a. On the merits, the trial judge determined that "denial of [petitioner's] promotion based on [his] brother's political persuasion violates due process." Pet. App. 13a. Judge Brown awarded petitioner $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages. Pet. App. 126a. Respondents did not appeal to the Michigan Supreme Court from the determination that they were liable on the merits of petitioner's § 1983 claim for violating his due process rights, and that determination is not in contention here.

The Michigan Court of Appeals held that the Court of Claims properly exercised jurisdiction over the § 1983 claim. In particular, the Court of Appeals interpreted Section 6440 of the Court of Claims Act, which states: "No claimant may be permitted to file claim in said court . . . who has an adequate remedy upon his claim in the federal courts." Michigan Court Laws 600.6440. The court construed this provision as specifically conferring jurisdiction on the Court of Claims to entertain § 1983 claims that would be barred in federal court by the Eleventh Amendment, such as claims against the state and its officers in their official capacity. Pet. App. 127a-129a. The court thus made clear that petitioner could not have brought a Court of Claims action against the Director of State Police except in his official capacity.[5]

The Michigan Court of Appeals nonetheless reversed the Court of Claims as to the statutory construction of § 1983. Relying on *Quern v. Jordan*, 440 U.S. 332 (1979), it concluded that the state is not a "person" within the meaning of § 1983. Pet. App. 131a-132a. This determination conflicted with the decisions of two other panels of the Michigan Court of Appeals, which had held that the state and its agencies are "persons" under § 1983. *See Smith v. Michigan*, 122 Mich. App. 340, 333 N.W.2d 50 (1983) and *Karchefske v. Dept. of Mental Health*, 143 Mich. App. 1, 371 N.W.2d 876 (1985). *See also Hampton v. Michigan*, 144 Mich. App. 794, 799-800, 377 N.W.2d 920 (1985) (state is not a "person"). Because of the conflict, the

5 The Michigan Supreme Court expressly affirmed these holdings. Pet. App. 10a.

Michigan Supreme Court granted leave to appeal and consolidated the *Will* and *Smith* cases for argument.

On the consolidated appeal, the Michigan Supreme Court decided, by a 4-2 vote, that the state and its officials were not "persons" for purposes of § 1983. The Michigan Supreme Court based its decision on this Court's holding in *Quern v. Jordan*, *supra*, concluding that the fact that § 1983 did not abrogate the states' Eleventh Amendment immunity "was tantamount to deciding" that a state is not a "person" under § 1983. Pet. App. 36a-37a. The court also relied in its decision on an independent analysis of the "historical circumstances surrounding the enactment of § 1983." Pet. App. 43a.

A different 4-2 majority of the Michigan Supreme Court determined in *Smith* that neither sovereign nor statutory governmental immunity applied to constitutional violations. It was necessary to reach that issue in *Smith* because the Michigan Supreme Court decided that there was an implied right of action for violation of the Michigan constitution. Pet. App. 9a. The positive rulings on the state constitutional claim and sovereign immunity issues, however, were of no assistance to petitioner. Though his complaint had originally set forth state constitutional claims along with the § 1983 claims on which he prevailed in the trial court, the Michigan Supreme Court held that he had waived his right to assert any state constitutional claims by failing to preserve them for appeal. Pet. App. 98a. As a result, the Michigan Supreme Court's negative determination on whether a state is a "person" under § 1983 removed all possibility of relief for respondents' unconstitutional actions.

Justices Archer and Levin dissented, noting that § 1983 was enacted to enforce the provisions of the Fourteenth Amendment, which were directed against the states. Their opinion also cites several state and federal cases holding that states are "persons" under § 1983. *See* Pet. App. 117a-120a.

SUMMARY OF ARGUMENT

The question in this case is whether states, their agencies and officers acting in official capacity are "persons" for purposes of damage actions under 42 U.S.C. § 1983. Petitioner readily concedes that the Eleventh Amendment bars such suits in federal courts under most circumstances. However, the fundamental error of the court below was that it confused the broad remedial scope of § 1983 with the Eleventh Amendment's limits on federal jurisdiction. Whether § 1983 authorizes a cause of action against state defendants, in the absence of an Eleventh Amendment immunity, must be decided by normal rules of statutory construction. Applying those rules, it is clear that the court below erred.

First, the legislative history of § 1983 demonstrates clearly that the 42d Congress—whatever its intent to abrogate the states' Eleventh Amendment immunity—intended to authorize civil actions against all state actors who violated federal rights, and thereby to provide a statutory remedy coextensive with the protections of the Fourteenth Amendment.

Second, this Court's decision in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), supports a holding that states are "persons" under § 1983. Consistent with that view, this Court has frequently assumed or confirmed in dictum that § 1983 provides a remedy against all state defendants. Moreover, this Court has clearly held that state officers may be sued in their official capacities for prospective *injunctive* relief, refusing to bifurcate the statutory term "person" on the basis of relief sought. At a minimum, therefore, state officers such as the respondent Director of the Michigan Department of State Police come within the scope of § 1983.

Third, a holding that § 1983 provides a cause of action against state defendants, thus making some state defendants suable in state court under § 1983 but not in federal court, is fully consistent with principles of federalism. State courts have historically heard federal claims barred in federal courts. It also in no way impairs the states' Eleventh Amendment immunity

from suit in federal court, since the "person" question is governed by a different standard than the question of Eleventh Amendment abrogation.

Finally, even assuming *arguendo* that the term "person" should be construed in light of Eleventh Amendment considerations, the Michigan Supreme Court erred in concluding that the 42d Congress would have thought that the Eleventh Amendment applied to § 1983 and other federal question cases despite the fact that *Hans v. Louisiana*, 134 U.S. 1 (1890), was not decided until 20 years after § 1983's enactment.

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF § 1983 DEMONSTRATES THAT THE 42D CONGRESS INTENDED TO CREATE A CAUSE OF ACTION AGAINST STATES, THEIR AGENCIES AND OFFICERS ACTING IN THEIR OFFICIAL CAPACITIES

This Court has regularly turned to the legislative history of § 1983 for assistance in construing its terms. *See e.g.*, *Monell v. New York City Dep't of Social Services*, *supra*; *Monroe v. Pape*, 365 U.S. 167 (1961). The meaning of the term "person" acting "under color of" state law is thus a matter of ordinary statutory construction where, as here, Eleventh Amendment considerations are absent, *see* Part IIA, *infra*. The legislative history of § 1983 clearly demonstrates that Congress intended to provide civil remedies against *all* state actors who transgressed the Fourteenth Amendment rights of citizens—whether states themselves, their agencies, or officers acting in their official capacities.

A. The 42d Congress intended that the remedies in § 1983 be coextensive with the rights secured by the Fourteenth Amendment, which it understood as operating directly upon the states

Section 1983 is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, ch 22 (1871) ("the Act"). The Act was the fourth of a series of civil rights laws passed by the Reconstruction Congress, beginning with the Civil Rights Act of 1866, 14 Stat. 27, ch 31 (1866), and followed by the [Civil Rights] Enforcement Act of 1870, 16 Stat. 140, ch 114 (1870), and the [Civil Rights] Enforcement Act of 1871, 16 Stat. 433, ch 99 (1871). Section 1 of the Act created a civil cause of action for violation of civil rights which paralleled a penal provision first enacted as Section 2 of the 1866 Act and reenacted as Section 17 of the 1870 Act. Thus, § 1 of the Act should be read as an extension of pre-existing principles of general civil rights enforcement against state actors, in contrast to the other sections of the Act, particularly § 2 (now 42 U.S.C. § 1985), which were addressed to a specific problem which preoccupied the 1871 Congress: the private violent rampage being conducted against Reconstruction by the Ku Klux Klan (KKK) both in and outside of state and local government.

On March 28, 1871, Representative Shellabarger introduced H.R. 320, entitled "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes" ("the Bill"). Section 1 of the Bill passed both Houses without amendment or substantial opposition and became § 1 of the Act. After going to two Conference Committees, the amended Bill was approved by both Houses on April 19, 1871 and became law the next day. (A more detailed summary of the Act's legislative history appears *infra*, Br. App. 29a.) In § 1, Congress created a complete remedy for violations of the Fourteenth Amendment by giving to the citizen whose rights were violated the right to bring "*any* action at law, suit in equity or other proper proceeding for redress [against] . . . *any* person" acting "under color of" state law who was responsible for the violation.[6]

As would be expected, the legislative history to the Act is replete with references to the Fourteenth Amendment. Congress was aware that a first draft of the Fourteenth Amendment—which merely granted power to Congress to pass legislation to secure rights to citizens in the states—was withdrawn in favor of one that granted rights directly to citizens, prohibited states from violating those rights, and granted to Congress the power to enforce those rights against the states. *See generally* Cong. Globe Appendix, 42d Cong., 1st Sess., 150-151 (1871) (Rep. Garfield) [hereafter "Globe" or "Globe App."]. The revolutionary character of the Fourteenth Amendment was thus the creation of duties that ran from sovereign states to their own citizens as a matter of federal law. Representative Garfield emphasized this fact in his speech in support of the 1871 Bill. In contrast to the rejected version of the Fourteenth Amendment he observed that

> [t]he one [enacted] exerts its force *directly upon the States*, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations.

Globe App. 150 (emphasis added).[7] Representative Shellabarger, the author of the Bill, its manager in the House, and a

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6 The 1874 recodification of § 1 replaced "any person" with "every person" and changed "any action at law" to the current "an action at law."

7 This Court has noted this feature of the Fourteenth Amendment as well, noting that its prohibitions

> are directed to the States . . . . They have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken.

Ex parte Virginia, 100 U.S. 339, 346-347 (1880). *See also Virginia v. Rives*, 100 U.S. 313, 318 (1880) and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-456 (1976). It was the "abrogation and denial of rights, *for which the States alone were or could be responsible*, [that] was the great seminal and fundamental wrong which was intended to be remedied [by the Fourteenth Amendment]." The *Civil Rights Cases*, 109 U.S. 3, 9 (1883) (emphasis added).

member of the House Select Committee looking into the need for such legislation, explained the Bill to the House by emphasizing this same point:

> [W]here is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment *in restraint of the States* and affirmative conferment of power on Congress, the *States still remained unrestrained*, . . . to make laws, abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens *as the State may please*, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

Globe App. 69 (1871) (emphasis added). Thus, Representative Shellabarger argued that affirmative legislation was needed to give the individual citizens a statutory cause of action to enforce rights created by the Fourteenth Amendment:

> [W]here personal rights were invaded *by the States* . . . Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guaranties, as between persons in the State *and the State itself*.

Globe App. 70 (emphasis added).[8]

These ideas were repeated by the Senate manager of the Bill, Senator Edmunds. He began with the same premise as Shellabarger: Section 1 was "so very simple" because it was "really reenacting the Constitution." Globe 569. The Bill was necessary to protect citizens "in the rights that the Constitution gave them . . . against any assault *by any State* or under any State or *through the neglect of any State* . . . ." Globe 697. The potential for violation of these newly granted constitutional rights demanded a complete statutory remedy:

> There is nothing in a violation of law, there is nothing in the default of public duty, unless it is to be followed by punishment or recompense, or both. That is all there is to it.

Globe 757.

The intent to enforce the Fourteenth Amendment by providing a full remedy against the states is also evident in the speech made in support of the Bill by Representative Bingham, the author of § 1 of the Fourteenth Amendment. After declaring the Bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . *to the extent of the rights guarantied to him by the Constitution*," Globe App. 81, he continued:

> The powers of the States have been limited and the power of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to *protect the rights of citizens against States*, and individuals in States, never before granted.

Globe App. 83 (emphasis added). He went on:

> Why not in advance provide against *the denial of rights by States*, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people? *The States* never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . .
>
> *[T]he States* did deny to citizens the equal protection of the laws, *they* did deny the rights of citizens under the Constitution, and except to the extent of the express limitations

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8 Congress' intent in the Fourteenth Amendment and its enforcing legislation to elevate individual rights over the historical primacy of state sovereignty is further illustrated by Rep. Bingham's closing statement (to applause) in his speech supporting the 1871 Bill: "The citizen . . . has a higher destiny than that of the States." Globe App. 86.

> upon the States, as I have shown, the citizen has no remedy. . . . *They* took property without compensation, and he had no remedy. *They* restricted the freedom of the press, and he had no remedy. *They* restricted the freedom of speech, and he had no remedy. *They* restricted the rights of conscience, and he had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against *all such abuses and denials of right as these in States and by States*, or combinations of persons?

Globe App. 85 (emphasis added).[9]

Representative Bingham consistently referred to the Bill (when it was first introduced in the House) as enforcing rights "against either States or unlawful combinations of men." Globe App. 82, 83, 85. It is clear that the phrase "against . . . States" was a reference to § 1 because of the Bill's content. At that time, the Bill contained only four substantive sections.[10] Since the second, third and fourth provided various remedies for violations by "unlawful combinations of men," such as the KKK, Bingham could only have been referring to § 1 when he referred to enforcement of rights "against . . . States."

On the Senate side, Senator Trumbull maintained that Congress was empowered by the Fourteenth Amendment to "correct" violations of its provisions and to "*prevent any state* from depriving any person" of the rights therein. Globe 577 (emphasis added). He elaborated:

> Whenever the rights that are conferred by the Constitution of the United States on the Federal Government *are infringed upon by the States, we should afford a remedy*. . . . I am ready to pass appropriate legislation on that subject; and I understand that this bill as it passed the House of Representatives *was framed on this principle*.

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9 *See* Globe App. at 153 (comments of Rep. Garfield); Globe at 367-368 (comments of Rep. Sheldon); Globe 475-477 (comments of Rep. Dawes).

10 The fifth section was a saving provision for previously enacted civil rights statutes.

Globe 578-579 (emphasis added). In words directly parallel to those of Representative Bingham, Senator Boreman viewed the Bill as necessary to avoid "the merest mockery" of

> say[ing] that the citizens of any portion of this country had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights. . . . [The goal is] to provide the machinery in order that the injured person may secure his rights.

Globe App. 229. *See also* Globe 650 (comments of Sen. Sumner).

Opponents of the Bill were clearly aware of the impact of the Bill on states. For example, Representative Arthur complained that the Bill:

> reaches out and draws within the despotic circle of central power *all the domestic, internal, and local institutions and offices of the States, and then asserts over them* an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof.

Globe 365 (emphasis added). *See also* Globe App. 217 (comments of Sen. Thurman).

In response, the Bill's supporters did not seek to minimize the impact of the proposed legislation on the states. The Bill's supporters stated that opponents correctly understood the Bill's provisions but that Congress had the power under the Fourteenth Amendment to reach the states themselves:

> If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities. We must remember that it was State rights, perverted I admit from

> their true significance, that arrayed themselves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, *if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution*; and that Federal laws and Federal rights must be protected whether domestic laws of their administration are interfered with or not, because the Constitution and the law made in pursuance thereof are the supreme law of the land.

Globe 502 (comments of Sen. Frelinghuysen) (emphasis added).

The consistent theme throughout the debates, then, was that § 1 was intended to provide a remedy coextensive with the rights secured against the states by the Fourteenth Amendment, and that § 5 of the Fourteenth Amendment was a sufficient constitutional basis for imposing such liability. As this Court observed in *Monell*, "there can be no doubt that § 1 of the Civil Rights Act was intended to provide *a remedy, to be broadly construed, against all forms of official violation* of federally protected rights." 436 U.S. at 700-701 (emphasis added).[11]

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11 Justice Stewart explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), how § 1983 was "a product of a vast transformation" in this country's concepts of federalism:

> Section 1983 was . . . enacted for the express purpose of 'enforc-[ing] the provisions of the Fourteenth Amendment' . . . and was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the amendment which was its centerpiece—the role of the federal government as a guarantor of basic federal rights against state power was clearly established.

Id. at 242.

B. Because Congress considered a state to be a corporation, it understood that remedies against state officers implicated the state

It is clear that Congress considered states to be legal persons in terms of the traditional relationship between corporations and their officers and fully recognized that states, as corporations, could act only through their agents. As Senator Edmunds, the manager of the Bill, explained:

> *A State is a corporation*; it exists only, in contemplation of law, as an organized thing; and it is manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved. Therefore, if it is the duty of the executive and judicial departments of a State to enforce a law and they do not enforce it, the State does not enforce it. If it is their duty not to enforce a law and they do enforce it, it is the State that enforces it.

Globe 696 (emphasis added). The opponents of the 1871 Act accepted and used the same corporate terminology in arguing that the liability created by the Act was an unwarranted attack on state sovereignty. *See e.g.*, Globe at 661 ("What is a State? Is it not a body politic and corporate? . . . A State can act how? Only through its departments"); *id.* at 662 ("A State can act only through its organization; it is a body corporate and politic") (comments of Sen. Vickers).

As Senator Edmunds pointed out, if, as in this case, state officers enforce an unconstitutional state law, "it is the State that enforces it." Just as the duties of the state are imposed on state officers, likewise remedies which are imposed on state officers are imposed directly on the state, as explained Representative Burchard:

> What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? *Its violation by the State can only be consummated through the officers by whom it acts* . . . .

Globe App. 314 (emphasis added).

Congress deliberately adopted the terminology of corporate law in describing the states so as to make clear that actions by state officers were state actions and that state violations of the Fourteenth Amendment could be remedied by suing state officers. Because each state was a corporate body ("a body politic and corporate"), application of § 1983 to its officers necessarily implicated the state itself. Thus, the legislative history makes it clear that, in subjecting officers to suit under § 1983—which no one doubts Congress did—it understood that it was effectively authorizing claims against the state.[12]

C. The Sherman Amendment debates demonstrate that the supporters of Section 1 assumed Congress could impose liability for money damages against state officers

When the Bill reached the Senate, Senator Sherman added an amendment that would have imposed vicarious liability on each resident of a county, city or parish where mob violence such as that perpetrated by the KKK took place. *See Monell*, 436 U.S. at 702 (Appendix to Opinion of the Court). The House rejected this amendment and the 1st Conference Report substituted a provision for the Sherman Amendment (hereafter "the modified Sherman Amendment") which shifted liability for money damages from the residents personally to the local governmental unit. *Id.* at 703-704. As explained in *Monell*, the key debates on the modified Sherman Amendment were not between the Republicans and Democrats, but rather between the radical Republican supporters and the score of moderate House Republicans who opposed the provision and spelled its defeat.

12 The Dictionary Act, passed two months before § 1983 was enacted, provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such word[ ] w[as] to be used in a more limited sense." Act of February 25, 1871, § 2, 16 Stat. 431. That language was subsequently modified. *See* Rev. U.S. Stats. § 1 (1874), 1 U.S.C. § 1, and *Monroe*, 365 U.S. at 190 n.47. Nevertheless, this Court in *Monell* used the Dictionary Act to supplement the abundant evidence in the legislative history of § 1983 to show that the phrase "any person" was to be given a broad interpretation to effectuate the sweeping remedial purposes of the Act. *See* 436 U.S. at 683, 688-89.

The Republicans, moderate and radical alike, considered it self-evident that the Fourteenth Amendment gave Congress the power to subject states and their officers to liability for damages. Relying on this assumption, proponents of the modified Sherman Amendment structured their argument in the form of the following simple syllogism:

> MAJOR PREMISE: Congress has the power under the Fourteenth Amendment to impose liability for damages on states and their agents for failure to provide equal protection of the law.
>
> MINOR PREMISE: Counties and cities are agents of the state.
>
> CONCLUSION: Therefore Congress has the power under the Fourteenth Amendment to impose liability for damages on counties and cities for failure to provide equal protection of the law.

In explaining the modified Sherman Amendment, Senator Edmunds, as the Senate conference manager, used this syllogistic argument, saying that it was "perfectly conclusive":

> *[T]he Constitution declares that it shall be the duty of the State* to give to everybody the equal and complete protection of its laws; and *where, therefore, there is a State organism*, as a county, which is intrusted with the local administration of justice . . . then this clause in the Constitution *which speaks of the protection which the States must afford* to all their inhabitants equally under the law, to preserve them against riots and tumults, *does speak . . . to the municipal authorities* existing under the State law directly; *and when, therefore, they fail to perform the duty of protection*, which the theory of this law implies that they are bound to perform, against tumult and riot, *then the Constitution has declared that Congress, by ap-*

> *propriate legislation, may apply to them the duty of making reimbursement.*

Globe 756 (emphasis added). Representative Shellabarger, the House Conference manager, relied on the same logic in presenting the modified Sherman Amendment. In response to the question whether "it is competent for the United States to inflict liabilities and resulting taxes upon a municipal corporation," he replied:

> [This] is, in its legal significance, the same question we have heard before in these and other Halls, "Can the United States coerce a State?" Today it is, "Can the United States coerce a county of a State, touching a subject-matter over which the United States has power . . . ."

Globe 751. The Republican supporters of the modified Sherman Amendment felt confident in characterizing liability against counties as a species of liability against states precisely because they assumed that the Fourteenth Amendment supported their major premise that Congress could impose liability on states directly.

What is more important than the supporters' views, however, is that the moderate Republican *opponents* of the modified Sherman Amendment (who prevailed in the House) accepted the same major premise of state liability, while denying the minor premise that municipalities were the same as states. The remarks of Representative Willard illustrate this:

> [T]he Constitution has not imposed . . . any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the *State*. . . . The city and the county have no power except the power that is given them by the State . . . . We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation . . . .

> I hold that this duty of protection, if it rests anywhere, rests on the *State*, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, *this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.*

Globe 791 (emphasis added). Representative Poland made the same point:

> As I understand the theory of our Constitution, the national Government deals *either with States or with individual persons*. . . . With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever.

Globe 793 (emphasis added). *See also* Globe 795 (comments of Rep. Burchard).

Thus, the moderate Republican opposition to the modified Sherman Amendment rested their arguments on the same major premise underlying those of the proponents: that Congress could clearly impose liability for money damages on a state through its officers for violation of the Fourteenth Amendment. The Republican opponents parted company with the proponents only as to the next step in the syllogism that equated local units of government with the state where the violation involved failure to provide law enforcement.

This Court's exhaustive review of the Sherman Amendment debates in *Monell* supports this reading of the legislative history:

> [O]pponents [of the Sherman Amendment] argued that municipalities were not generally charged by the States with keeping the peace and hence did not have police forces, so that the duty to afford protection ought not to

> devolve on the municipality, *but on whatever agency of state government was charged by the State with keeping the peace.*

Id. at 670 n.21 (emphasis added). Though there was doubt as to the power of Congress to "dictate the manner in which a State fulfilled its obligations of protection," because it was "a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc.," *id.* at 673 n.30, there was *no doubt* "that the Federal Government could impose on the *States* the obligation imposed by the Sherman Amendment . . . ." *Id.* (emphasis by the Court).[13]

II.

THIS COURT'S DECISIONS SUPPORT THE CONCLUSION THAT STATES AND STATE OFFICERS ARE "PERSONS" UNDER § 1983 WHERE, AS HERE, ELEVENTH AMENDMENT CONSIDERATIONS ARE ABSENT

The issue of who is a "person" acting "under color of" state law within the meaning of § 1983 is decided according to normal rules of statutory construction. *See* Part IIIB, *infra*. That inquiry is separate and distinct from whether Congress has abrogated the states' Eleventh Amendment immunity to suit in federal court.

13 Some *Democratic* opponents *did* argue against the modified Sherman Amendment by rejecting the major premise. However, the Republicans viewed those Democratic arguments as mooted by the passage of the Fourteenth Amendment. *See e.g.*, Globe 774 (comments of Sen. Morton); Globe 800 (comments of Rep. Perry). Moreover, as *Monell* teaches, the relevant legislative history of the Sherman Amendment must be found in the comments of the House moderate Republicans who voted *for* § 1 of the Act rather than the Democrats, who uniformly voted on party lines *against* every section of the Bill, including § 1, all three versions of the Sherman Amendment, and the Second Conference substitute which was enacted with the support of the House moderate Republicans. 436 U.S. at 673, 676.

A. *Monell*'s construction of the term "person" and its reasoning support the conclusion that states and their agencies and officers come within the scope of the § 1983 cause of action

In *Monell v. New York Dep't of Social Services*, *supra*, this Court concluded that municipalities and their officers acting in their official capacity are "persons" under § 1983. Despite the fact that the *Monell* construction of the term "person" was necessarily limited to the municipality situation presented there, it supports the conclusion that states, and their agencies and officers acting in their official capacity, should be included within the definition of "person."

First, *Monell* construed the reach of the word "person" in a way that allows states to be included in it. The Court observed that "[a]n examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover *legal as well as natural persons*." *Id.* at 683 (emphasis added). Further, because "there is nothing in the 'context' of [§ 1983] calling for a restricted interpretation of the word 'person', the language of that section should prima facie be construed to include '*bodies politic*' among the entities that could be sued." 436 U.S. at 689 n.53 (emphasis added). Finally, *Monell* observed that "there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against *all forms of official violation* of federally protected rights." *Id.* at 700 (emphasis added).

Second, *Monell* articulated a statutory construction test that is equally applicable here. As the *Monell* Court observed,

> *absent a clear statement* in the legislative history supporting the conclusion that § [1983] was *not to apply* to the official acts of a municipal corporation—which is simply not present—*there is no justification for excluding* municipalities from the "persons" covered by § [1983].

Id. at 701 (emphasis added). This is the identical presumption used by this Court to include states within generic classes of defendants in other federal statutes. For example, in determining that the state of Alabama was a "common carrier by railroad"

covered by the Federal Employers' Liability Act, this Court declined to hold,

> *in the absence of express provision to the contrary*, that [Congress] intended to exclude a particular group of [railroad] workers from the benefits conferred by the Act.

Parden v. Terminal Railway of Alabama, 377 U.S. 184, 190 (1964) (emphasis added). *See also Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 282 (1959) (state is "employer" covered by Jones Act); *California v. Taylor*, 353 U.S. 553 (1957) (Railway Labor Act includes states); *United States v. California*, 297 U.S. 175 (1936) (Federal Safety Appliance Act applies to states).[14]

In the present case, as in *Monell*, there is *no* "clear statement" in the legislative history that states were *not* intended to be sued under § 1983, and, consistent with the *Parden/Petty* line of cases, it would be wrong to presume that Congress "intended to exclude a particular group of" victims of unconstitutional state action from the benefits of § 1983's civil remedies. In fact, as demonstrated in Part I, *supra*, there is abundant evidence that Congress affirmatively intended that states come within the scope of the civil remedies authorized by § 1983.

Third, the reasoning of *Monell* for including municipalities within the definiton of "person" applies equally to states. The *Monell* Court found significant the fact that "municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [§ 1983]." *Id.* at 685-86. Because state power and resources far exceed those of any municipality or individual officer, states through their official acts enjoy an even *greater* capacity than either municipalities or natural persons to create the harms intended to be

14 To the extent that *Parden* or *Petty* holds that mere inclusion of states within the class of suable defendants is sufficient to abrogate the Eleventh Amendment, they are apparently overruled according to the plurality opinion in *Welch v. Texas Dep't of Highways*, 483 U.S. ____, 107 S.Ct. 2941 (1987). However, they are still good law for determining when a federal statute states a cause of action against states, as the plurality in *Welch* itself makes clear. *See id.* at 2947 nn.6 & 7 and at 2957 (White, J., concurring). *See also* Part IIIA, *infra*.

remedied by § 1983. Indeed, since the harms that Congress had in mind were violations of the Fourteenth Amendment—that is, harms resulting from violation of the injunction that "[n]o *State* shall make or enforce any law" transgressing the rights secured therein—states are the most logical defendants under § 1983.

B. This Court has repeatedly assumed that states, state agencies, and state officers acting in their official capacities are "persons" suable under § 1983

Perhaps the most obvious evidence of this Court's assumption that a § 1983 cause of action can be made out against a state is found in the Eleventh Amendment "waiver" doctrine under which states may consent to being sued for damages in federal court. The waiver doctrine has been developed almost entirely in § 1983 cases on the clear assumption that the state *was* fully subject to suit under § 1983 if the Eleventh Amendment was not applicable. For example, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the extended debate between the majority and the dissent over waiver was meaningful only if the § 1983 claim was otherwise proper.[15] Moreover, in all the § 1983 cases in this Court involving allegations that a state had waived its Eleventh Amendment immunity, this Court has never suggested that, were immunity in fact waived, the case would nonetheless have to be dismissed for failure to make out a cause of action. This Court's statement in *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), is typical: "Unless a State has waived its Eleventh Amendment immunity . . . , a State cannot be sued directly in its own name regardless of the relief sought." *See also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) and *Quern v. Jordan*, 440 U.S. at 339-40. The clear import of such a statement is

15 The "person" issue would have been considered jurisdictional in *Edelman* and thus could have been raised by the Court on its own motion, as the Court in fact did the year before in *Kenosha v. Bruno*, 412 U.S. 507, 511-12 (1973) (treating the "person" issue as one of subject matter jurisdiction because the same wording is used in 28 U.S.C. § 1343(3), the only basis for jurisdiction without regard to amount in controversy in the federal courts at the time).

that, but for the lack of consent, the suit would otherwise be proper.

In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court observed that a state agency created by compact with another state was suable under § 1983: "[i]f the respondents have enacted unconstitutional legislation there is no reason why *relief against [the agency] itself* [under § 1983] should not adequately vindicate petitioners' interests." *Id.* at 405 n.29 (emphasis added). Because of the land use regulation functions that the agency served and its limited geographical jurisdiction, this Court held that it was not entitled to Eleventh Amendment immunity. 440 U.S. at 400-02. However, an interstate compact agency has traditionally been assumed to be a state agency by this Court. *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. at 279. Consequently, like states that waive their Eleventh Amendment protections, interstate compact agencies, though generally considered a part of the contracting state, are nonetheless suable "persons" under § 1983 if there is no Eleventh Amendment problem.

This Court has also decided several cases where a state was sued by name in state court under § 1983 and has never raised any question of the propriety of those suits. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the state of Maine was sued for welfare benefits and in *Martinez v. California*, 444 U.S. 277 (1980), the state of California was sued for damages allegedly caused by its parole board's release of a prisoner. In both cases, several aspects of § 1983 law—including the propriety of bringing such actions in state court—were discussed without anyone doubting the existence of a cause of action against the state. *See Martinez*, 444 U.S. at 283 n.7 and *Maine*, 448 U.S. at 3 n.1 (indicating that state courts have concurrent jurisdiction over § 1983 claims). Further, as discussed in Part III, *infra*, this Court has repeatedly referred to the availability of a § 1983 damages remedy against states in state court in its Eleventh Amendment decisions.

This Court's attorney fee decisions are also consistent with the assumption that states are "persons." This Court has allowed awards of attorney fees under 42 U.S.C. § 1988 directly against a state department of corrections, *see Hutto v. Finney*, 437 U.S. 678 (1978), against a judge in her official capacity, *Pulliam v. Allen*, 466 U.S. 522, 543-544 (1984), and against a state itself. *Maine v. Thiboutot*, *supra*. Moreover, this Court has clearly recognized that "fee liability runs with merits liability" and, consequently, that a § 1983 fee award is possible only

> when a State in a § 1983 action has been prevailed against for relief on the merits, *either because the State was a proper party defendant or because state officials were sued in their official capacity* . . . .

Kentucky v. Graham, 473 U.S. at 168. *See also id.* at 164.[16]

Because "liability on the merits and responsibility for fees go hand in hand," *id.* at 165, the cases approving fee awards against states and state officers support the proposition that the scope of the § 1983 cause of action should reach them as well. In *Monell*, this Court relied for its holding in part on § 1988, which it viewed as a "recent expression[ ] of congressional intent" that was "inconsistent" with *Monroe*'s conclusion that municipalities were not "persons." 436 U.S. at 696. As noted in *Monell*, it is clear from the legislative history of § 1988 that Congress intended that fees would be "collected from the official, *in his official capacity*, from funds of his agency or under his control, or *from the State or local government (whether or not the agency or government is a named party).*" *Id.* at 699, quoting Senate Report No. 94-1011 at 5 (1976) (emphasis by the Court).

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16 Even setting aside the awards in *Hutto* and *Pulliam* as official capacity suits for *injunctive* relief (*but see* Part IIB, *infra*), *Maine v. Thiboutot* was a § 1983 action brought against the state of Maine in state court in which the state was directed "to pay the correct amounts retroactively" to certain individuals who had been denied welfare benefits. 448 U.S. at 3.

C. State officers in their official capacities are "persons" suable under § 1983 regardless of the nature of relief sought

In the present case, petitioner sued both the Michigan Department of State Police and the Director of State Police in his official capacity. This Court has held that "official capacity suits represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis . . . ," *Monell*, 436 U.S. at 691 n.55, and that "a judgment against a public servant 'in his official capacity' imposes a liability on the entity he represents." *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *accord Kentucky v. Graham*, 473 U.S. at 166. Like *Monell*, the present case is one in which "Eleventh Amendment considerations do not control analysis." Thus, if petitioner properly brought his claims against the respondent Director, petitioner should prevail.

The federal courts have had little opportunity to decide whether a *damages* claim against an officer in his official capacity comes within the terms of § 1983. Such claims are invariably barred by the Eleventh Amendment, absent waiver. *See e.g.*, *Edelman v. Jordan*, 415 U.S. at 651. However, unlike § 1983 suits against states, which are barred by the Eleventh Amendment regardless of the relief sought, *Alabama v. Pugh*, *supra*, § 1983 suits against state officers for prospective *injunctive* relief have been allowed for years even though the relief effectively runs against the state. As this Court stated in *Hutto v. Finney*, 437 U.S. at 690, under *Ex parte Young*, 209 U.S. 123 (1908), "federal courts [can] enjoin state officials in their official capacities."[17] Indeed, because claims for injunctive relief against a state officer seek to compel or restrain the officer in

17 § 1983 suits brought under the *Young* fiction against officials who then resign or die have always been subject to the free substitution rule in Fed. R. Civ. P. 25, rather than continuing the former official in the caption or substituting his estate. For example, the *Jordan* litigation, of which *Edelman v. Jordan* and *Quern v. Jordan* were a part, witnessed the succession of Messrs. Weaver, Swank, Trainor, Edelman and Quern.

the use of the powers held by virtue of his or her office, the officer *must* be sued in his or her official capacity.[18]

There is no reason to believe that Congress intended state officers to be regarded as "persons" under § 1983 for some purposes but not others. A similarly strained reading of § 1983 was rejected in *Kenosha v. Bruno*, 412 U.S. 507 (1973), where this Court observed:

> nothing in the legislative history . . . or in the language actually used by Congress . . . suggest[s] that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought.

412 U.S. at 513.[19]

The majority opinion in *Monell* demonstrated how unlikely it would have been that the 42d Congress intended to exclude official capacity officer suits from the purview of § 1983 by noting that the legislative history explicitly discussed state takings of property without just compensation as an example of the type of case that could be brought under § 1983:

18 Under Michigan law, claims for both injunctive relief and damages must be alleged against the state officer in his or her official capacity. Michigan Court Rule 2.201(C)(3) states: "An officer of the state or governmental unit must be sued in the officer's official capacity to enforce the performance of an official duty."

19 Though *Kenosha v. Bruno* was overruled by *Monell*, the Court in *Monell* specifically approved the quoted language as reflecting the proper approach to the "person" definition. 436 U.S. at 701 n.66. In the face of the plain wording of the statute, no other rule of construction would be possible. In § 1 of the 1871 Act, Congress expressly authorized "*any action at law, suit in equity, or other proper proceeding for redress*" to be brought against "any person . . . [acting] under color of" state law in violation of the plaintiff's federal rights. Moreover, in *Monell*, this Court declined to use the *Young* fiction to interpret the meaning of "person" in § 1983, despite the fact that the court of appeals below had suggested that approach. In his concurring opinion, Justice Powell explained the illogic of "import[ing], by analogy, the Eleventh Amendment fiction of *Ex parte Young* into § 1983," noting that to do so "would create tension with *Kenosha*." *See* 436 U.S. at 712.

> Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.

436 U.S. at 687. This is especially true where a state officer is acting pursuant to an unconstitutional state law for the benefit of the entity that employs the officer (the situation in this case). As Justice Powell observed in his concurrence in *Monell*:

> The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.

436 U.S. at 707 (emphasis by Justice Powell).

Justice Powell's concurrence in *Monell* also suggests another approach to the official capacity suit question: that the appropriate focus is not merely the term "person," but rather the phrase "person . . . [acting] under color of [state] law." Taking this approach, there is ample evidence to indicate that this phrase, at a minimum, was intended to subject state officers to civil liability in their official capacities.

This Court has recognized from the beginning of modern § 1983 law in *Monroe* that, whatever other uses § 1983 might have to impose individual liability on "rogue" state officers whose actions in violation of federal rights also violate state law, § 1983 was primarily intended to be a means of gaining redress for just that situation mentioned by Justice Powell: "action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not

remediable under, state law." This is based in part on the fact that it was the invalidation of certain state laws enforced by officers acting in their official capacities pursuant to those state laws that § 1983 was primarily intended to reach. *See* Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499 (1985). Thus, in *Monroe* there was sharp disagreement whether acts *in violation of* state law were "under color of state law" for § 1983 purposes, but all agreed that action taken *pursuant to* state law came within the definition. *See* 365 U.S. at 237 (Frankfurter, J., dissenting). *See generally id.* at 211-58; *see also* Zagrans, 71 Va. L. Rev. at 535-39.

The present case involved numerous state police officials, all acting pursuant to a specific state statute and standard departmental procedure in surveilling petitioner's brother and maintaining a "Red Squad" file on him, noting petitioner's employment application in that file, communicating the contents of that file to other personnel officials in the department, and using that information to deny petitioner the promotion for which he was qualified. As the trial judge remarked, the state police officials who carried out the mandate of the "Red Squad" statute

> to a great extent . . . are not to be blamed for what went on. They were simply, if you will, carrying out orders. . . . [They] just simply blindly followed the law, and so they are at fault. The State is at fault for having passed it.

J.A. 72-73. The burden of liability should fall at the source of the deprivation: actions of the state of Michigan itself, at its highest executive and legislative levels.

III.

INCLUSION OF STATES, THEIR AGENCIES AND OFFICERS WITHIN THE DEFINITION OF "PERSON" IS FULLY CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM AND ESTABLISHED ELEVENTH AMENDMENT LAW

A. A construction of § 1983 that would subject states to suit in their own courts, though not in federal courts, is consistent with fundamental principles of federalism

It is in the nature of our federal system that federal courts have limitations on their jurisdiction that state courts do not, of which the Eleventh Amendment is just one example. Yet, the Michigan Supreme Court thought it "unlikely" that there would be a species of § 1983 claims that could be brought in state court, but over which the federal courts would not have jurisdiction because of the Eleventh Amendment. *See* Pet. App. 44a. In fact, such a result is both normal and common in our federal system.

For almost 200 years of our history, there have been many federal claims that could be brought in state, but not federal court. For the first 100 years—except for the short-lived "Law of the Midnight Judges," 2 Stat. 89 (Feb. 13, 1801), *repealed*, 2 Stat. 132 (Mar. 3, 1802)—lower federal courts had no general federal question jurisdiction at all. All such business was handled by the state courts with access to this Court ultimately in the event of an appeal. See § 25 of the Judiciary Act of 1789, 1 Stat. 73 (Sept. 24, 1789). *See generally* F. Frankfurter and J. Landis, *The Business of the Supreme Court* 24-30 (1927). Even after federal question jurisdiction was enacted in 1875, *see* 18 Stat. 470 (Mar. 3, 1875), an amount in controversy requirement was imposed for another 100 years until 1980,[20] with the result

20 In 1976, the amount in controversy was eliminated for federal question cases where a federal official was a defendant, P.L. 94-574, § 2, 90 Stat. 2721 (Oct. 21, 1976), and in 1980, it was eliminated for the balance of federal question cases.

that all federal question suits not meeting that requirement were proper in state court, but *not* in federal court.

In recent years, consistent with this history, the Court has frequently noted that certain federal claims can be brought only in state court. For example, in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 122 (1984) (*Pennhurst II*), this Court recognized that "[u]nder *Edelman v. Jordan* . . . a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court."

The interplay between this Court's decisions in *Maine v. Thiboutot*, *supra*, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), presented another situation where certain kinds of § 1983 claims were required to be brought in state court because the federal courts lacked jurisdiction. In *Chapman*, this Court construed 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983, to provide subject matter jurisdiction without regard to amount in controversy over § 1983 claims brought to enforce constitutional but not statutory rights. Yet, in *Maine v. Thiboutot*, this Court held that state violations of both federal constitutional and statutory rights were within the scope of § 1983. One argument against this construction of § 1983 was that it would be illogical for Congress to authorize a claim under § 1983 and yet not provide for federal jurisdiction. This Court observed:

> There is no inherent illogic in construing § 1983 more broadly than § 1343(3) was construed in *Chapman v. Houston Welfare Rights Organization* . . . . It would only mean that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U.S.C. § 1331(a)'s $10,000 jurisdictional amount is satisfied.

448 U.S. at 8. *See also id.* at 11 n.12 (acknowledging that absent federal jurisdiction over federal claims, plaintiffs "would be forced to go to state courts").

In addition, state courts can grant relief from unconstitutional state tax laws free from the strictures of the Tax Injunc-

tion Act and federalism-based comity doctrines that normally bar a federal court from acting. *See Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Pennhurst II*, 465 U.S. at 122. *See also* Note, *Section 1983 in State Court: A Remedy for Unconstitutional Taxation*, 95 Yale L. J. 414 (1985).

Outside the context of § 1983, the Eleventh Amendment abrogation cases provide examples of this Court's acceptance of the proposition that the state court can hear federal statutory claims against states that would be barred in federal court because of the Eleventh Amendment. In *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279 (1973), the majority rejected arguments that lack of federal jurisdiction because of the Eleventh Amendment over claims against state defendants authorized by the Fair Labor Standards Act would create a "right without a remedy," by pointing out that the Act "[a]rguably . . . permits suit in the Missouri courts." *Id.* at 287. A more complete discussion of the question is found in the concurring opinion of Justices Marshall and Stewart:

> [B]y those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power [set forth in the Eleventh Amendment] bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. *See Testa v. Katt*, 330 U.S. 386 (1947). *See also General Oil v. Crain*, 209 U.S. 211 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339-340 (1816).

411 U.S. at 298.

Justice Marshall's reasoning was applied by the majority of this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Holding that the federal Vocational Rehabilitation

Act established a cause of action against state defendants but did not abrogate California's Eleventh Amendment immunity, the Court disputed the claim that its interpretation would leave individuals whose statutory rights are violated by the state without any monetary remedy:

> This claim wholly misconceives our federal system. As Justice Marshall has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals." *Employees v. Missouri Dept. of Public Health and Welfare*, *supra* at 293-294 (concurring in result) . . . It denigrates the judges who serve on the *state courts* to suggest that they will not enforce the supreme law of the land.

Id. at 240 n.2 (emphasis added).

Finally, only last Term in *Welch v. Texas Dept. of Highways*, 483 U.S. ____, 107 S.Ct. at 2941, a plurality of this Court held that Congress had not abrogated Texas' Eleventh Amendment immunity under the Jones Act, specifically separating that question from the issue of whether the Act authorized a cause of action against the state. *Id.* at 2947 n.6 (plurality opinion). As Justice White noted in his concurring opinion, "the Court . . . has already construed the Jones Act to extend remedies to such seamen [employed by the states]" in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. at 282-283. *Id.* at 2957 (White, J., concurring). Of course, the continued existence of a remedy would have been important for only one reason: suit against the state in state court. *See* 46 U.S.C. § 688(a) (providing for suit against the employer in "the district in which the defendant employer resides or in which his principal office is located").[21]

The fact is that the greater exposure to liability in state court in this case is created not by petitioner's reading of § 1983, but by the Eleventh Amendment. Petitioner's reading of § 1983 is

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21 *See also* and *compare Lauf v. E.G. Shinner Co.*, 303 U.S. 323, 330 (1938) (federal court prohibited from entering labor injunction) with *Truax v. Corrigan*, 257 U.S. 312, 328-29 (1921) (labor injunction proper in state court).

consistent: Under § 1983, a plaintiff can make out a *cause of action* against the state in *both* state and federal court. The fact that § 1983 has greater force in state court results from the fact that the state has an Eleventh Amendment defense in federal court that is not available in state court.[22]

B. Holding that states, their agencies and officers acting in their official capacities are "persons" under § 1983 is not inconsistent with established Eleventh Amendment law

The definition of "person" under § 1983 raises the question of the scope of the cause of action established by the statute—that issue can and should be decided under normal rules of statutory construction. *See Monell*, 436 U.S. at 658. By contrast, the question of Eleventh Amendment abrogation is governed by a clear intent rule not imposed in any other context. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Consequently, deciding that a state is a "person" under § 1983 in no way affects its Eleventh Amendment immunity or the validity of this Court's decision in *Quern v. Jordan*, *supra*.

In *Quern*, this Court was unwilling to presume that "Congress intended by the general language of § 1983 to override" Eleventh Amendment immunity, *id.* at 341, in the absence of "a history which focuse[d] directly on the question of state liability and which show[ed] that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Id.* at 345. Though the concurring opinion in *Quern* viewed matters differently, the majority opinion carefully avoided deciding the separate question of whether the state or its agents were "persons" against whom a cause of action could be made out. An affirmative decision of that question here would not affect any aspect of Eleventh Amendment abrogation law.

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22 The Eleventh Amendment is not the only constitutional limitation on the jurisdiction of federal courts that is inapplicable to state courts. Article III of the Constitution restricts federal power to an actual case or controversy. By contrast, the Michigan Supreme Court has rendered advisory opinions even on matters of federal constitutional law. *See* 1963 Mich. Const. Art. 3, § 8.

In several other Eleventh Amendment cases, this Court has similarly recognized that Congress has authorized a cause of action against a class of defendants that includes states and yet found insufficient intent to abrogate Eleventh Amendment immunity, thereby implicitly relegating plaintiffs to a state court forum for relief against the states. *See Atascadero State Hospital*, 473 U.S. at 245-46; *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. at 279; *Welch v. Texas Dep't of Highways*, 483 U.S. ____, 107 S.Ct. at 2941. In those cases, this Court has separated the cause of action and immunity issues, observing that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital*, 473 U.S. at 246.

IV.

THE MICHIGAN SUPREME COURT ERRED IN DECIDING THE "PERSON" ISSUE BY REFERENCE TO IRRELEVANT ELEVENTH AMENDMENT LAW

As argued above, the Michigan Supreme Court's decision is based upon several premises that are unsupportable. First, it improperly conflates the two separate issues of who is a "person" for cause of action purposes with abrogation of immunity under the Eleventh Amendment, finding that "Congress' failure to abrogate the states' Eleventh Amendment immunity indicated it never intended to subject states to suit as persons pursuant to § 1983." Pet. App. 42a. *See* Part IIIB, *supra*, and Cert. Pet. 11-14. Second, it improperly finds that the 42d Congress "intended to provide a [§ 1983] remedy in federal, not state courts." Pet. App. 44a. *See* Cert. Pet. 24-26. Third, it concludes that it would be "unlikely" to have a species of § 1983 claim that could be entertained in state court, but not in federal court despite the fact that such a result is a normal feature of our federal system. Pet. App. 44a-45a. *See* Part IIIA, *supra*.

However, even assuming *arguendo* that Eleventh Amendment law at the time § 1983 was passed should be taken into account in determining the meaning of the term "person," the version of Eleventh Amendment law that the Michigan Supreme Court assumed was in the mind of the 42d Congress is much too broad.

A. The 42d Congress would have believed that the Eleventh Amendment posed no obstacle to actions under § 1983 against states because Eleventh Amendment immunity had not yet been extended to federal question cases

The text of the Eleventh Amendment extends its protections only to suits "commenced or prosecuted against one of the United States by Citizens of another State or by Citizens of Subjects of any Foreign State." Though its provisions are now understood to extend not only to diversity cases, but to federal question cases as well, we owe that reading of the Amendment to *Hans v. Louisiana*, 134 U.S. 1 (1890)—decided almost 20 years after § 1 of the 1871 Civil Rights Act was debated. It is petitioner's position that the 42d Congress' silence about possible Eleventh Amendment problems with enforcement of § 1983 against states is not "amazing" (Pet. App. 45a), but rather is readily explainable by the fact that there was no basis for concluding that it applied at all to the federal law claims created by § 1 of the 1871 Act. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (common law immunities not incorporated into § 1983 unless "well established" at time § 1983 was enacted). To say that Congress would have intended to "incorporate" Eleventh Amendment immunity into the "person" definition, the burden should be on respondents to show that it was "well established" in 1871 that Eleventh Amendment immunity would apply to § 1983 claims.

In extending the Eleventh Amendment to bar federal question suits, *Hans* was a major change from Eleventh Amendment law as it had existed up until then. The *Hans* Court effectively admitted this by its analytical approach. It failed to offer even *one* pre-1883 case to support its conclusions and could only portray its holding as "clearly established by the

decisions of this Court in several *recent* cases. *Louisiana v. Jumel*, 107 U.S. 711 [1883]; *Hagood v. Southern*, 117 U.S. 52 [1886]; *Ex parte Ayers*, 123 U.S. 443 [1887]." 134 U.S. at 10 (emphasis added). In default of any but recent precedent, the Court had to go back to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and the debates on Article III to construct an argument from the ground up. What pre-1883 law there was on the Eleventh Amendment's applicability to federal questions cases, of course, were the observations of Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-383 (1821), which are, as the *Hans* Court recognized, decidedly to the contrary. *Hans*, 134 U.S. at 20. *See also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857-858 (1824) and *Welch v. Texas Dept. of Highways*, 483 U.S. ____, 107 S.Ct. at 2964 (Brennan, J., dissenting).

One searches the major legal treatises of the day in vain for anything close to the broad reading of the Eleventh Amendment given by *Hans* or for anything suggesting that cases other than diversity suits are contemplated within its protections. *See e.g.*, 1 J. Kent, *Commentaries* 297 (11th ed. 1867); 2 J. Story, *Constitution of the United States* 462 (2d ed. 1851). Indeed, Story quotes Chief Justice Marshall's comment in *Osborn v. Bank of the United States*:

> The [Eleventh] amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

9 Wheat. at 857-858. Moreover, Judge Conkling, in the 1864 edition of his widely-respected treatise on federal courts, observed that the Eleventh Amendment only applied to diversity cases and that "if the case arises under the constitution, &c., or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties." A. Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* 4 (4th ed. 1864). Professor Curtis told Harvard law students essentially the same thing as late as 1880. *See* B. Curtis,

Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States, 14, 18 (1880).[23]

There are good reasons for the paucity of pre-1883 citations to support the *Hans* Court's conclusion. One reason that it is highly unlikely that the *Hans* holding would be "well established" in Eleventh Amendment jurisprudence is found in the fact that there were few federal law claims brought against states between 1789 to 1871. Further, what experience there was with the few federal law claims that were brought disclosed no problem with the Eleventh Amendment. Most of those cases were cases like *Hans*: suits under the Contracts Clause, Art. I § 10, cl. 1.

Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872), was a contemporary case indicative of the law of the Eleventh Amendment at the approximate time of the passage of § 1983 and a case that clearly would have been barred under post-*Hans* Eleventh Amendment law. In *Hans*, the plaintiff bondholders sought to recover accrued interest on bonds issued, but since repudiated by Louisiana, claiming violations of the Contracts Clause. They lost, of course. In *Davis*, a railroad sued the Governor of Texas under the Contracts Clause to recover vast tracts of land granted to it before the Civil War, but thereafter repudiated by the Texas Constitution of 1869. The Court in *Davis* decided in favor of the plaintiffs, rejecting the argument that the Eleventh Amendment barred the suit.[24] It held that the Texas laws repudiating the grant were "nullities" under the Contracts Clause, *id.* at 232, observing that, "[u]pon the grounds of jurispru-

23 Contemporary legal treatises should be given special weight because they are likely to have been the very sources of law that members of Congress had on their bookshelves and from which they gained their understanding of the law. Interestingly, the *Hans* Court observes that the reasons for its broad reading of state immunity are "fully discussed by writers on public law," 134 U.S. at 21, but fails to cite any.

24 *Compare Edelman v. Jordan*, 415 U.S. 615 (1974) ("equitable restitution" barred by Eleventh Amendment to the same extent as a traditional damages judgment). *See also Quern v. Jordan*, 440 U.S. at 345 n. 17, suggesting *Davis v. Gray* is inconsistent with *Edelman* and *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (suit for restitution of taxes barred by Eleventh Amendment).

dence of both the United States and of Texas," the suit was "well brought as regards the defendants." *Id.* at 222. It broadly observed:

> (1) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law *in conflict with the Constitution or a statute of the United States*, when such execution will violate the rights of the complainant.
>
> (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is sufficient reason for the omission to do it, and *the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.*

Id. at 220 (emphasis added).

It is significant that two dissenting justices argued that the suit was one against the Governor in his official capacity and therefore "in effect against the State of Texas" and that "the state is exempt from suit at the instance of private persons," 83 U.S. at 233 (Davis, J., dissenting). Indeed, the arguments of counsel for Texas, which were necessarily rejected by the Court, read like the holding in *Hans*. They argued that "[t]he reason for the adoption of the Eleventh Amendment was, that the states were not willing to be arraigned as defendants before the Federal courts at the instance of private persons, *be the cause of action what it may*," and urged that the Constitution "never did extend the judicial power to cases where a private individual was plaintiff and a state defendant." *See Hans*, 134 U.S. at 13, 15-16. Had anything like the broad immunity assumed by *Hans* been "well established" at the time, surely it would have garnered more than two justices' votes.[25]

25 For this proposition, counsel relied, *inter alia*, on *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), a case in which the Court held that a suit against the Governor of Georgia in his official capacity for the proceeds of the illegal seizure and sale of plaintiff's slaves was barred by the Eleventh Amendment.

B. Congress would have known that suits under § 1983 against states would be proper despite the Eleventh Amendment in state court where that immunity is inapplicable and in federal court when it is waived

Contrary to the view of the Michigan Supreme Court, defining states as "persons" under § 1983 would not have been regarded as a useless act by the 42d Congress even under the broadest reading of the Eleventh Amendment. First, the Eleventh Amendment does not apply in state courts, which have concurrent jurisdiction over § 1983 suits.[26] Second, the Eleventh Amendment does not apply in federal court when it has been waived.

There is no doubt that the 42d Congress would have known the concept of waiver of Eleventh Amendment immunity. Waiver is older than the Eleventh Amendment itself, being mentioned several times in *Chisholm v. Georgia*, *supra*. This should be no surprise since the whole concept of sovereign immunity which the Eleventh Amendment was meant to capture, at least with regard to diversity suits against states in federal court, is the notion that the sovereign cannot be sued without its consent. *Id.*; *Missouri v. Fiske*, 290 U.S. 18, 24 (1933).

Indeed, waiver would have been much easier under Eleventh Amendment law in 1871 than it is now. Entering a general appearance was one form of waiver. *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (despite Eleventh Amendment, "in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction"). This, of course, explains why it was thought

26 Judge Spencer Roan of Virginia, an ardent advocate of states' rights, observed that the protection of the Eleventh Amendment "is confined to the Federal Courts, in exclusion of those of the states: for, if the State Courts were also inhibited from this jurisdiction, the parties [mentioned in the Eleventh Amendment] would be left without any redress whatever, when aggrieved by a state." *Hunter v. Virginia*, 18 Va. 11, 23, 4 Munf. 1, 34-35 (1814). This idea is carried forward in *General Oil v. Crain*, 209 U.S. 211 (1908) (state sovereign immunity cannot bar federal constitutional claim).

necessary in *Chisholm v. Georgia*, for the state of Georgia to refuse to appear to respond to the process issued by this Court in that case.[27] Other forms of waiver existed as well. In *Bank of the United States v. Planter's Bank*, 22 U.S. (9 Wheat.) 904 (1824), the Court held that a state-owned bank was subject to suit despite the Eleventh Amendment, because

> when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character . . . . The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, . . . and waives all the privileges of that character . . . .

22 U.S. at 907-908.[28] *See also Bank of Kentucky v. Wister*, 27 U.S. (2 Pet.) 318, 323 (1829) (bank wholly owned by state divested itself of sovereignty when it engaged in trade).[29]

In sum, nothing in the Eleventh Amendment deprives state courts of power to hear § 1983 cases against states or their officers. Indeed, the facts of this case demonstrate the importance

27 Modern Eleventh Amendment jurisprudence is to the contrary on this form of waiver. *See e.g.*, *Edelman v. Jordan*, 415 U.S. at 651 (where state appeared generally in trial court and did not raise Eleventh Amendment as a defense, nevertheless allowed to raise issue for the first time in the court of appeals).

28 *Compare Florida Nursing Home Ass'n v. Florida Dep't of Health*, 450 U.S. 147 (1981) (Florida statute giving department of state government power to "sue and be sued" is not a waiver of Eleventh Amendment protections). Later decisions of this Court have rejected any "proprietary" waiver argument. *See Ex Parte New York*, 256 U.S. 490, 500-03 (1921) (collision with state tugboat). *See also* and *compare Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (state railway) *with Employees v. Dep't of Public Health and Welfare*, 411 U.S. at 284 (distinguishing *Parden* on grounds that activities were not "proprietary" because not run for profit).

29 Given the state of Eleventh Amendment law at the time of § 1983 enactment, the 42d Congress would surely have wanted to extend a damage remedy to black farmers denied a crop-planting loan by a state-owned bank that acted pursuant to a state statute that prohibited extensions of credit to blacks.

of maintaining the state courts as an available forum for the vindication of constitutional rights. Respondents' actions, undertaken pursuant to Michigan law, "lie[ ] so close to the core of the coverage intended by Congress that it is hard to conceive of . . . conduct that would come within [§ 1983] if this does not." *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971).

CONCLUSION

For all the above reasons, the decision of the Michigan Supreme Court should be reversed.

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APPENDIX

Michigan Public Acts 38, 39 and 40 of 1950 (Extra Session)

[No. 38.]

AN ACT to make criminal certain activities relating to the overthrowing or destroying of government by force, violence, sabotage, or terrorism; to prescribe the penalties therefor; to define duties of the attorney general and the state police; to prevent unlawful disclosures of information and to prescribe penalties therefor; and to repeal certain acts and parts of acts inconsistent with or contravening any provisions of this act.

The People of the State of Michigan enact:

752.311 Overthrowing or destroying government, preventing. [M.S.A. 28.243(1)]

Sec. 1. It is hereby declared that the governments of the United States and of this and other states of the United States are threatened by attempts to overthrow existing government by force and violence. In the light of the present world situation, it is deemed necessary to enact legislation preventing activity leading to such forceful overthrow. It is declared to be the purpose of this statute to maintain, preserve, and strengthen our established form of government and to prevent changes therein except by the procedures provided by our constitutions.

752.312 Certain acts deemed felony. [M.S.A. 28.243(2)]

Sec. 2. Whoever knowingly or wilfully advocates, aids, abets, advises, encourages or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or of this or any other state of the United States or any political subdivision thereof, by force, violence, sabotage, or terrorism or attempts or conspires to do so; or

Whoever, with intent to cause the overthrow or destruction of the government of the United States or of this or of any other state of the United States or any political subdivision thereof, commits any act of force, violence, sabotage, or terrorism, or attempts or conspires to do so; or

Whoever, with intent to cause the overthrow or destruction of the government of the United States, or this or any other state of the United States or any political subdivision thereof, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, encouraging, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying any such government by force, violence, sabotage, or terrorism or attempts or conspires to do so; or

Whoever organizes, or helps or attempts to organize, or becomes or is a member of or affiliates with, any society, group, or assembly of persons which has as 1 of its purposes advocating, abetting, advising, encouraging, or teaching the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or of this or any other state of the United States or any political subdivision thereof, by force, violence, sabotage, or terrorism, knowing such purpose;

Shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

752.313 Duties of attorney general and state police. [M.S.A. 28.243(3)]

Sec. 3. (a) The attorney general shall maintain complete records of all information received by him and may deliver to the prosecuting attorney of any county all information and evidence of matters which have come to his attention relating in any manner to the activities prohibited by section 2 of this act. The attorney general may cooperate with the prosecuting attorneys of the several counties or may intervene in any proceedings or may initiate proceedings in enforcing the provisions of this act. The expense incurred by any county of this state in the prosecution of any person charged with violation of this act shall, upon approval by the attorney general, be reimbursed to such county from the general fund of the state.

(b) The attorney general may cooperate with the attorney general of the United States, the department of justice of the United States, the federal bureau of investigation, and all other

police agencies which collect and exchange information and evidence relating to activities prohibited by this act.

(c) The state police shall collect information and evidence relating in any manner to activities prohibited by this act and may cooperate and exchange information relating thereto with any police agency and shall, at the request of the attorney general, report to him any such information and evidence so collected, necessary to any prosecution for the violation of the provisions of this act.

(d) Any person who discloses any information or evidence collected under authority of this act, except as authorized hereby or except as specifically authorized by the attorney general, shall be guilty of a felony.

752.314. Sections repealed; pending proceedings. [M.S.A. 28.243(4)]

Sec. 4. (a) Sections 1 and 2 of Act No. 168 of the Public Acts of 1935, being sections 752.301 and 752.302, respectively, of the Compiled Laws of 1948, are hereby repealed.

(b) All proceedings pending and all rights and liabilities existing, acquired or incurred, at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings are or were commenced. It is the legislative intent that this act shall not be construed to alter, affect, or abate any pending prosecution, or prevent prosecution hereafter instituted under such repealed sections, chapters or acts for offenses committed prior to the effective date of this act; and all prosecutions pending at the effective date of this act, and all prosecutions instituted after the effective date of this act, for offenses committed prior to the effective date of this act, may be continued or instituted under and in accordance with the provisions of the law in force at the time of the commission of such offense.

752.315 Severing clause. [M.S.A. 28.243(5)]

Sec. 5. If any provision, section, clause, or phrase of this act, or the application thereof to any person or circumstance, is held

invalid, the remainder of the act, and the application of such provision, section, clause, or phrase to other persons or circumstances, shall not be affected thereby.

This act is ordered to take immediate effect.

Approved September 8, 1950.

[No.39.]

AN ACT to protect the welfare and safety of the people of the state of Michigan; to provide for civilian defense, the organization of the Michigan state troops, a security investigation division in the Michigan state police, and for additional personnel in the Michigan state police; to make an appropriation therefor; and to provide for the disbursement thereof.

The People of the State of Michigan enact:

30.101 Security investigation division, appropriation.

Sec. 1. There is hereby appropriated from the general fund of the state for the fiscal year ending June 30, 1951, to the Michigan state police the sum of $74,300.00 for a special division hereby created within the department of the Michigan state police to be known as the security investigation division, to investigate activities within the state that are not related to industrial reforms but are subversive of state or federal security, including but not by way of limitation acts of criminal syndicalism and sabotage, to obtain and compile information concerning such activities, and to cooperate with military authorities, and to cooperate with federal, state and local law enforcing and investigating agencies in the enforcement of federal and state laws relating thereto as follows:

Salaries and wages	$31,900.00
Contractual service, supplies and materials	16,410.00
Equipment	25,990.00
Total	$74,300.00

The files containing such information shall not be open for public inspection, nor shall such information contained therein be released: Provided, That the commissioner may furnish information to federal, state and local law enforcement agencies or to the responsible heads of any agency having charge of employment by the state whom he considers proper to receive the same when, in his opinion, it is necessary to carry out the objectives of this section. The commissioner of the Michigan state police is hereby authorized, in the creation and operation of such division, to appoint, employ, assign or retain such persons outside of or within the department of the Michigan state police as he may deem necessary, in carrying out the provisions of this act regarding subversive activities, at such compensation as he may determine. In his discretion, he may designate 1 or more of such employees to have the powers of any officer of the Michigan state police.

30.102. Michigan state troops, appropriation.

Sec. 2. There is hereby appropriated from the general fund of the state for preliminary planning and organization of the Michigan state troops the sum of $30,000.00. In case of the induction of a portion or all of the Michigan national guard into federal service, the unexpended balance of the appropriation made under the provisions of Act No. 32 of the Public Acts of the Extra Session of 1950 to the military establishment may be used for the organization, administration and training of the Michigan state troops to the extent of replacing the Michigan national guard units as may become necessary.

30.103. Civilian defense, appropriation.

Sec. 3. There is hereby appropriated from the general fund of the state for civilian defense the sum of $100,000.00 for the fiscal year ending June 30, 1951, disbursable under the provisions of Act No. 83 of the Public Acts of 1943, being sections 30.1 and 30.19, inclusive, of the Complied Laws of 1948.

30.104 Michigan state police; appropriation, purpose.

Sec. 4. There is hereby appropriated from the general fund of the state to the Michigan state police for the fiscal year ending June 30, 1951, the sum of $158,645.00, to provide additional personnel as follows:

Salaries and wages	$74,470.00
Contractual service, supplies and materials	59,760.00
Equipment	24,415.00
Total	$158,645.00

30.105 Federal funds, control and release.

Sec. 5. All moneys received from the federal government by the state of Michigan for the use of any department or agency for which an appropriation is made under the provisions of this act are hereby appropriated for the purposes for which granted. All moneys appropriated under the provisions of this act and all moneys received from the federal government for the use of any department or agency for which an appropriation is made under the provisions of this act shall be subject to the supervisory control of the state administrative board and shall be disbursed in accordance with the accounting laws of the state when released by the state administrative board. The state administrative board is hereby authorized to release said funds from time to time as needed.

This act is ordered to take immediate effect.

Approved September 8, 1950.

[No. 40.]

AN ACT to authorize the commissioner of the Michigan state police to create a subversive activities investigation division within the department of the Michigan state police, and to define the powers and duties of this division and of the commissioner and members of the Michigan state police and local police agencies in relation thereto; and to prescribe penalties for violations of the provisions of this act.

The People of the State of Michigan enact:

28.51 Subversive activities investigation division; establishment and appointment. [M.S.A. 4.448(1)]

Sec. 1. The commissioner of the Michigan state police is authorized to establish within the department of the Michigan state police a division to be known as the subversive activities investigation division, the personnel of which shall be appointed by the commissioner.

28.52 Same; duties. [M.S.A. 4.448(2)]

Sec. 2. The duties of the subversive activities investigation division shall be to investigate activities within the state that are subversive of state or federal government, to obtain and compile information concerning such activities, to cooperate with military authorities, and to cooperate with federal, state and local law enforcing and investigating agencies in the enforcement of federal and state laws relating thereto.

28.53 State police commissioner, powers. [M.S.A. 4.448(3)]

Sec. 3. The commissioner shall have power:

(a) To maintain in the subversive activities investigation division confidential files of information on activities that are subversive of government, and activities contrary to federal law as aforesaid. Such files shall not be open for public inspection, nor shall information contained therein be released: Provided, That the commissioner may furnish information to federal, state and local law enforcement agencies or to the responsible heads of any agency having charge of employment by the state whom he considers proper to receive the same when, in his opinion, it is necessary to carry out the objectives of this act.

(b) To call upon any sheriff or other police officer of any county, city, or township or village, for information on such activities and for aid and assistance, within the limits of their respective jurisdictions, in the performance of any duty imposed by this act and, upon being notified or called upon for such aid

and assistance, it shall be the duty of the officer concerned to comply with such order to the extent requested. Refusal or neglect to comply therewith shall be deemed nonfeasance in office and shall subject the officer so refusing or neglecting to removal from office.

(c) To appoint, employ, assign or retain such persons outside of or within the department of the Michigan state police as he may deem necessary, in carrying out the provisions of this act regarding subversive activities, at such compensation as he may determine and at his discretion to designate 1 or more of them to have the powers of an officer of the Michigan state police.

(d) To make such rules and regulations for the administration of the subversive activities investigation division as he shall deem necessary.

28.54 Revealing information deemed felony. [M.S.A. 4.448(4)]

Sec. 4. Unless otherwise directed by the commissioner of the Michigan state police, no information concerning the identity of personnel engaged in such subversive investigation work or the specific expenditure of moneys appropriated for the purpose of carrying out such investigations shall be revealed publicly or to any unauthorized person by any state agency, official or employee. Any person violating the provisions of this section shall be deemed guilty of a felony.

28.55 Assistance by officials and employees of state and local governmental units. [M.S.A. 4.448(5)]

Sec. 5. To effectuate the broad objectives of this act, officials and employees of state and local governmental units and agencies thereof are hereby authorized to assist officers of the Michigan state police in the investigation of subversive activities.

28.56 Subversive activities defined. [M.S.A. 4.448(6)]

Sec. 6. The term "subversive activities" as used in this act shall be construed to mean and include criminal syndicalism as it relates to political reform only and as it is otherwise defined under section 46 of Act No. 328 of the Public Acts of 1931, being section 750.46 of the Compiled Laws of 1948, or as the term "subversive activities" may be defined by other laws of the state of Michigan heretofore or hereafter enacted.

Approved September 8, 1950.

Michigan Compiled Laws of 1948

CHAPTER VIII
ANARCHY AND CRIMINAL SYNDICALISM

750.46 Definition.

Sec. 46. Criminal syndicalism defined—Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as provided in this chapter.

HISTORY: This section supersedes Sec. 1 of Act 255 of 1919, being C L 1929, 16559.

750.47 Advocacy of criminal syndicalism.

Sec. 47. Advocacy of criminal syndicalism—Any person who by word of mouth or writing, advocates or teaches the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform; or prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written matter in any form, containing or advocating, advising, or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence or other unlawful methods of terrorism; or openly, wilfully and deliberately justifies by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence or other unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organizes or helps to organize, or becomes a member of or voluntarily assembles with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism is guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by a fine of not more than 5,000 dollars.

HISTORY: This section supersedes Sec. 2 of Act 255 of 1919, being C L 1929, 16560.

750.48 Red flag, display.

Sec. 48. Display of red flag—Any person who shall display a red flag in any public assembly, parade or demonstration in this state is guilty of a felony.

The use of such a flag at any such assembly, parade or demonstration shall be considered as prima facie evidence of its use as an emblem of anarchy.

HISTORY: This section supersedes and merges Sec. 1 of Act 104 of 1919, being C L 1929, 16561; and Sec. 2 of Act 104 of 1919, being C L 1929, 16562.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
Consol. No. 74 023 934 AZ, 76 610 100 CZ

WALTER BENKERT, et. al.,

Plaintiffs,

—vs—

MICHIGAN STATE POLICE, et. al.,

Defendants.

INTERNATIONAL UNION et al.
WILLIAM MILLSTEIN et al.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

At a session of said Court held in the City-County Building, Detroit, Michigan on June 9, 1976.

PRESENT: HONORABLE: James Montante,
Circuit Judge

This matter having come on before the Court for the entering of a Partial Summary Judgment pursuant to GCR 117, and Attorney for Defendant Michigan State Police having filed an answer to Plaintiffs' motion, and the Court having reviewed same,

IT IS HEREBY ORDERED:

1. That certain Michigan statutes, namely P.A. 38, 1950 (Ex. Sess.), 752.311-315 MCLA; P.A. 39, 1950 (Ex. Sess.), 30.101-105 MCLA; P.A. 40, 1950 (Ex. Sess.), 28.51-56 MCLA; P.A. 328, 1931, 750.46-48 MCLA; P.A. 117, 1952, 752.321-332 MCLA, as amended by P.A. 37, 1953, 752.322-325 MCLA, are

unconstitutional on their face in violation of the Michigan and United States Constitutions, and are null, unenforceable, and void *ab initio*,

2. That Defendants, and those working in concert or cooperation with them, shall not further operate pursuant to, attempt to enforce, or otherwise gather, maintain or use information under authority of the above cited statutes,

3. That any unit or division of personnel within Defendants' authority which has or has had as all or part of its function the gathering, maintaining, and using of information pursuant to the above cited statutes be dismantled to the extent of those functions,

4. That the personnel assigned to administer, investigate, or act in any way under the authority of the above cited statutes be reassigned, and

5. That consideration by the Court of specific elements to be implemented in a plan for a monitoring system, including but not limited to selection and appointment of a monitor, delineation of her/his responsibilities and authority, notification of all those on whom information has been or is being gathered, maintained, or used pursuant to the above cited unconstitutional statutes, and provisions for Defendants' payment of reasonable costs incurred in implementing appropriate relief to those affected be adjourned until June 9, 1976 at 2:15 p.m.

/s/ JAMES MONTANTE
Circuit Judge

Approved as to form

/s/ PATRICK A. ASELTYNE
Patrick A. Aseltyne
for State Defendants

/s/ MAUREEN P. REILLY
Maureen P. Reilly
for City Defendants

/s/ ILLEGIBLE
for the UAW

A TRUE COPY
JAMES R. KILLEEN
CLERK

/s/ JAMES R. KILLEEN
DEPUTY CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM
No. 75 174499 AA

HUMAN RIGHTS PARTY,

Plaintiff,

v

DEPARTMENT OF STATE POLICE, et al,

Defendants.

AMENDED ORDER OF JUDGMENT

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan this 3rd day of February, 1976.

PRESENT: Honorable Thomas M. Brown
Circuit Court Judge

WHEREAS the parties in this matter having met and agreed to finally resolve this matter and also having entered into a formal stipulation agreement, and the Court having read and reviewed same,

IT IS HEREBY ORDERED:

1. That certain Michigan statutes, namely 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40, are violative of the United States Constitution and the Michigan Constitution (1963) and, therefore, unenforceable, null and void,

2. That the defendants shall not further enforce or otherwise administer 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40,

3. That all files, records, names, and other materials kept by Defendants pursuant to 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40 are hereby taken into the supervisory custody and

control of the Court and shall be destroyed under the direction and authority of the Court, but that said files, records, names, and materials shall not be destroyed before sixty (60) days from date of entry of this Order, namely March 16, 1976, so as to allow any person the opportunity, if they so desire, to petition the Court for permission to personally review their own individual file, if one exists, before destruction of said file,

4. That all persons assigned by Defendants to administer, investigate or act in any way under the authority and auspices of 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40 shall be reassigned to other duties within the Department,

5. That the Defendants shall contact all state agencies and other law enforcement agencies within the state of Michigan informing them of the Judgment in this matter, as entered, and simultaneously asking them to destroy any materials, information or data received by them from Defendant's officers assigned to administer 1931 PA 328 and 1950 Ex Sess PA 38, 39 and 40,

6. That this Order shall not pertain to the files, records or dossiers, if any, of the fourteen (14) named Plaintiffs in the matter of *Walter Benkert, et al* v *Michigan State Police, et al*, No. 74 023 934 AZ, now presently before Wayne County Circuit Judge James Montante.

IT IS FURTHER ORDERED that a petitioner mentioned in Paragraph Three (3) must be supported by sufficient factual allegations of injury, damage or need to know before judicial approval of disclosure will be given.

/s/ THOMAS L. BROWN
Thomas L. Brown
Circuit Judge

A TRUE COPY
[ILLEGIBLE]

APPROVED BY:

_____
Zolton Ferency
Attorney for Plaintiff

CHAPTER 64. COURT OF CLAIMS

600.6401. Short title

Sec. 6401. This chapter shall be known and may be cited as "the court of claims act".

600.6404. Creation of court; judges

Sec. 6404. The court of claims is created as a function of the circuit court for the thirtieth judicial circuit. A circuit judge of the thirtieth judicial circuit and any judge assigned into the thirtieth judicial circuit by the state court administrator may exercise the jurisdiction of the court of claims as provided by law.

(2)[1] In case of the disability or absence from the place of holding court of a circuit judge before whom while sitting as the judge of the court of claims a case has been tried or motion heard, another circuit judge designated to sit as the judge of the court of claims to[2] may continue, hear, determine, and sign all matters that his or her predecessor could have continued, heard, determine, and signed.

(3) In case a circuit judge designated to sit as the judge of the court of claims dies before signing a judgment and after filing a finding of fact or rendering an opinion upon proof submitted and argument of counsel disposing of all or part of the issues in the case involved, a successor as judge of the court of claims may proceed with that action in a manner consistent with the finding or opinion and the judge is given the same powers as if the finding of fact had been made or the opinion had been rendered by the successor judge.

[1] So in enrolled bill; there is no subsec. (1).
[2] So in enrolled bill.

600.6407. Sessions, location; court officer

Sec. 6407. The court shall hold at least 4 sessions in each year. Sessions of the court of claims may be held in the various

circuits in the state as the supreme court administrator may determine. If the hearing in a particular case is to be held at a place other than the city of Lansing, due notice shall be given to all interested persons. The sheriff of the county within which a case is heard, or 1 of his deputies, shall serve as court officer without additional compensation therefor. The department and management and budget shall furnish the court with suitable space and equipment in the city of Lansing.

600.6410. Clerks; fees; service of process

Sec. 6410. (1) The circuit judges of the thirtieth judicial circuit shall appoint or remove the clerk of the court of claims.

(2) For making copies of records, proceedings, and testimony and furnishing the same at the request of the claimant, or any other person, the clerk of the court of claims, or any reporter or recorder serving in the court of claims shall be entitled in addition to salary, to the same fees as are by law provided for court reporters or recorders in the circuit court. No charge shall be made against the state for services rendered for furnishing copies of records, proceedings, or testimony or other papers to the attorney general.

(3) Process issued by the court may be served by any member of the Michigan state police as well as any other officer or person authorized to serve process issued out of the circuit court.

Amended by P.A.1986, No. 308, § 1, Eff. Jan. 1, 1987.

600.6413. Ingham county reimbursement of costs; transfer of employees; seniority rights; retirement benefits

Sec. 6413. (1) The state shall reimburse the county of Ingham for the reasonable and actual costs incurred by that county for implementing jurisdictional duties in the circuit court imposed on that county by this chapter.

(2) The county of Ingham shall submit quarterly its itemized costs as described in this section to the state court administrative office. After determination by the state court administrator of the reasonableness of the amount to be paid, payment shall

be made pursuant to the accounting laws of this state. Determination of reasonableness by the state court administrator shall be conclusive.

(3) Full-time employees of the court of claims are transferred to the circuit court for the thirtieth judicial circuit. Seniority rights, annual leave, sick leave, longevity pay and retirement benefits to which employees of the court of claims are now entitled shall be preserved and the employees shall be continued in their positions in the court of claims in the thirtieth judicial circuit in a manner not inferior to their prior status. The obligation of the state for retirement benefits to employees of the court of claims for their accrued service in the court of claims shall not be transferred. The retirement system available to public employees in Ingham county shall provide retirement benefits to employees of the court of claims not inferior to those provided therefor under their prior status.

600.6416. Representation of state by attorney general or assistants

Sec. 6416. The attorney general, or his assistants, shall appear for and represent the interests of the state in all matters before the court.

600.6419. Jurisdiction; claims less than $1,000; counterclaims

Sec. 6419. (1) **Power and jurisdiction.** Except as provided in sections 6419a and 6440,[1] the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. The state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458[2] upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. The court has power and jurisdiction:

(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

(b) To hear and determine any claims or demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part of the state or any department, commission, board, institution, arm, or agency of the state against any claimant who may bring an action in the court of claims. Any claim of the state or of any department, commission, board, institution, arm, or agency of the state may be pleaded by way of counterclaim in any action brought against the state, or any other department, commission, board, institution, arm, or agency of the state.

(2) **Judgment; counterclaims; process.** The judgment entered by the court of claims upon any such claim, either against or in favor of the state or any department, commission, board, institution, arm, or agency of the state, upon becoming final shall be res adjudicata of that claim. Upon the trial of any cause in which any demand is made by the state or any department, commission, board, institution, arm, or agency of the state against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each claim or demand, and if the court finds a balance due from the claimant to the state, the court shall render judgment in favor of the state for the balance. Writs of execution or garnishment may issue upon the judgment the same as from the circuit court of this state. The judgment entered by the court of claims upon any claim, either for or against the claimant, shall be final unless appealed from as provided in this chapter.

(3) **Jurisdiction, workers' compensation, peace officers.** The court of claims shall not have jurisdiction of any claim for compensation under the provisions of either of the following:

(a) The workers' disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

(b) Act No. 329 of the Public Acts of 1937, as amended, being sections 419.101 to 419.104.

(4) **Jurisdiction, circuit courts, sales tax, declaratory or equitable relief, other statutory claims, review of unemployment claims.** This chapter shall not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the general sales tax act, Act No. 167 of the Public Acts of 1933, being sections 205.51 to 205.78 of the Michigan Compiled Laws, or proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court, or proceedings to review findings as provided in the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.72 of the Michigan Compiled Laws, or any other similar proceedings expressly authorized by the statutes of this state in such case made and provided.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

[1] Sections 600.6419a and 600.6440.

[2] Section 600.6458.

600.6419a. Court of claims; concurrent jurisdiction

Sec. 6419a. In addition to the powers and jurisdiction conferred upon the court of claims by section 6419,[1] the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by section 605.[2]

P.A.1961, No. 236, § 6419a, added by P.A.1984, No. 212, § 1, Imd. Eff. July 9, 1984.

[1] Section 600.6419.

[2] Section 600.605.

600.6420. Claims of $500 or less, delegation of state administrative board's authority to determine and allow claims; payment

Sec. 6420. The state administrative board may delegate the authority vested in it by section 6419(1)[1] for any claim of $500.00 or less for damage or loss of personal property by a claimant who is an employee of the state, to the head of the department in which the claimant was employed. Payment of the claim shall be made upon the written certificate of the department head that the loss or damage occurred in the course of the claimant's employment, without fault on the part of the claimant and that the claimant has not otherwise been reimbursed for the loss.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

[1] Section 600.6419(1).

600.6421. Joinder of cases; trial by judge

Sec. 6421. Cases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various trial courts of the state. A case in the court of claims shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6422. Practice and procedure

Sec. 6422. Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as herein otherwise provided. The supreme court shall have power to make special rules for said court.

600.6425. Depositions

Sec. 6425. The statutes and rules governing the taking of depositions in suits in the circuit courts of this state shall govern in the court of claims, except that it is not sufficient that the

witness resides more than 50 miles from the place of holding court to enable the deposition to be used for any purpose.

600.6428. Witnesses, power to compel attendance

Sec. 6428. The court of claims is hereby given the same power to subpoena witnesses and require the production of books, papers, records, documents and any other evidence and to punish for contempt as the circuit courts of this state now have or may hereafter have. The judge and clerk of said court may administer oaths and affirmations, and take acknowledgments of instruments in writing.

600.6431. Notice of intention to file claim, contents, time, verification, copies

Sec. 6431. (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claims arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

600.6434. Pleadings, service, copies

Sec. 6434. (1) Except as provided in this section, the pleadings shall conform to the rules for pleadings in the circuit courts.

(2) The complaint shall be verified. The pleadings of the state need not be verified.

(3) The complaint shall be served upon any department, commission, board, institution, arm, or agency of the state involved in the litigation, in the same manner as a complaint filed in the circuit court.

(4) With each paper, including the original complaint filed by the claimant, 1 copy of each shall be furnished to the clerk who shall immediately transmit the copy to the attorney general.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6437. Judgment on stipulated facts

Sec. 6437. The court may order entry of judgment against the state or any of its departments, commissions, boards, institutions, arms or agencies based upon facts as stipulated by counsel after taking such proofs in support thereof as may be necessary to satisfy the court as to the accuracy of such facts and upon being satisfied that such judgment is in accordance with applicable law.

600.6440. Remedy in federal court as bar to jurisdiction

Sec. 6440. No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

600.6443. Trial by court without jury; new trial

Sec. 6443. The case shall be heard by the judge without a jury. The court may grant a new trial upon the same terms and under the same conditions and for the same reasons as prevail in the case of the circuit courts of this state, in a case at law without a jury.

600.6446. Appeal to court of appeals; procedure

Sec. 6446. (1) Appeals shall lie from the court of claims to the court of appeals in all respects as if the court of claims was a circuit court.

(2) The procedure for the taking of appeals to the court of appeals from the court of claims shall be governed by the statutes and court rules governing the taking of appeals from a circuit court to the court of appeals in a case at law, without a jury.

(3) The clerk of the court of claims shall immediately furnish the parties to every action with a notice of entry of any final order or judgment, and the time within which an appeal as of right may be taken shall be governed by the Michigan court rules.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6449. Costs, security for costs on appeal

Sec. 6449. (1) If the state shall put in issue the right of claimant to recover, the court may allow costs to the prevailing party from the time of the joining of the issue. The costs, however, shall include only witness fees and officers' fees for service of subpoenas actually paid, and attorney fees in the same amount as is provided for trial of cases in circuit court.

(2) Costs upon an appeal to the court of appeals shall be allowed in like amounts and for the same items as in a case appealed to the court of appeals from the circuit court.

(3) In the case of costs allowed against a claimant, judgment shall be entered thereon and writs of execution or garnishment may issue as from the circuit court.

(4) In the event of an appeal to the court of appeals by a claimant the judge may, upon motion by the attorney general, require security for costs from the claimant in connection with such an appeal.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9.

600.6452. Limitation of actions; rights of attorney general, petitions for administration of estate or appointment of guardian

Sec. 6452. (1) **Filing of claim.** Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440,[1] within 3 years after the claim first accrues.

(2) **Limitation of actions.** Except as modified by this section, the provisions of RJA chapter 58,[2] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

(3) **Attorney general; petition for administration of estate of a deceased person.** The attorney general shall have the same right as a creditor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the granting of letters of administration of the estate of any deceased person.

(4) **Petition for appointment of guardian of minor or person under disability.** The attorney general shall have the same right as a superintendent of the poor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the appointment of a guardian of the estate of a minor or any other person under disability.

[1] Section 600.6440.
[2] Section 600.5801 et seq.

600.6455. Court of claims; judgment, interest

Sec. 6455. (1) Interest shall not be allowed upon any claim up to the date of the rendition of judgment by the court, unless

upon a contract expressly stipulating for the payment of interest. All judgments from the date of the rendition of the judgment shall carry interest at the rate of 12% per annum compounded annually, except that judgment upon a contract expressly providing for interest shall carry interest at the rate provided by the contract in which case provision to that effect shall be incorporated in the judgment entered. This subsection shall apply to any civil action based on tort filed on or after July 9, 1984 but before January 1, 1987 and any action pending before the court of claims on July 9, 1984. This subsection shall apply to any action, other than a civil action based on tort, filed on or after July 1, 1984 and any action pending before the court of claims on July 9, 1984.

(2) Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

(3) For complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment.

(4) If a bona fide, reasonable written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered, the court shall order that interest shall not be allowed beyond the date the written offer of settlement which is made and rejected by the plaintiff, and is filed with the court.

(5) Except as otherwise provided in subsection (3), if a bona fide, reasonable written offer of settlement in a civil action based on tort is not made by the party against whom the judgment is subsequently rendered, or is made and that offer is not filed with the court, the court shall order that interest be calculated from the date of filing the complaint to the date of satisfaction of the judgment.

(6) Except as otherwise provided in subsection (3), if a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest computed under subsection (2).

(7) An offer made pursuant to this section which is not accepted within 21 days after the offer is made shall be considered rejected. A rejection, under this subsection or otherwise, does not preclude a later offer by either party.

(8) As used in this section:

(a) "Bona fide, reasonable written offer of settlement" means:

(i) With respect to an offer of settlement made by a defendant against whom judgment is subsequently rendered, an offer of settlement that is not less than 90% of the amount actually received by the plaintiff in the action through judgment.

(ii) With respect to an offer of settlement made by a plaintiff, an offer of settlement that is not more than 110% of the amount actually received by the plaintiff in the action through judgment.

(b) "Defendant" means a defendant, a counter-defendant, or a cross-defendant.

(c) "Party" means a plaintiff, or a defendant.

(d) "Plaintiff" means a plaintiff, a counter-plaintiff, or a cross-plaintiff.

Amended by P.A.1984, No. 212, § 1, Imd. Eff. July 9; P.A.1986, No. 178, § 1, Eff. Oct. 1.

600.6458. Judgment against state, payment

Sec. 6458. (1) In rendering any judgment against the state, or any department, commission, board, institution, arm or agency thereof, the court shall determine and specify in such

judgment the department, commission, board, institution, arm or agency from whose appropriation such judgment shall be paid.

(2) Upon any judgment against the state or any department, commission, board, institution, arm or agency thereof becoming final, or upon allowance of any claim by the state administrative board and upon certification thereof by the secretary of the state administrative board to the clerk of the court of claims, he, the clerk of the court shall certify to the auditor general the fact that such judgment was entered or that such claim was allowed and the same shall thereupon be paid from the unencumbered appropriation of the department, commission, board, institution, arm or agency: Provided, however, That the auditor general determines the funds therein are sufficient for such payment. In the event that funds are not available to pay any such judgment or allowed claim, the auditor general shall instruct the clerk of the court of claims to issue a voucher against an appropriation made by the legislature for the payment of judgment claims and allowed claims. In the event that funds are not available to pay any such judgment or allowed claim, such fact, together with the name of the claimant, date of judgment, date of allowance of claim by the state administrative board and amount thereof shall be reported to the legislature at its next session, and said judgment or allowed claim shall be paid as soon as moneys are available for such purpose. The clerk shall not certify any judgment to the auditor general until the period for appeal from such judgment shall have expired, unless written stipulation between the attorney general and the claimant or his attorney, waiving any right of appeal or new trial, is filed with the clerk of the court.

(3) The clerk shall approve vouchers under the direction of the court for the payment of the several judgments rendered by said court. All warrants issued in satisfaction of said judgments shall be transmitted to the clerk for distribution; and all warrants issued in satisfaction of claims allowed by the state administrative board shall be transmitted to the secretary of said board for distribution.

600.6461. Clerk's report to legislature, auditor general, budget director

Sec. 6461. (1) At the commencement of each session of the legislature and at such other times during the session as he may deem proper, the clerk of the court shall report to the legislature the claims upon which the court has finally acted, with a statement of the judgment rendered in each case.

(2) The clerk shall submit a detailed statement of the amount of each claim allowed by the court to the auditor general and the budget director.

600.6464. Judgment, discharge

Sec. 6464. The payment of any amount due as found by the judgment of the court of claims, including interest and costs, shall operate as a discharge of such judgment.

600.6467. State agencies to furnish information upon request

Sec. 6467. The court shall have power to call upon any officer, department, institution, board, arm or agency of the state government for any examination, information or papers pertinent to the issues involved in any case then pending before the court. No state employee shall receive any additional fees or compensation for rendering such services or appearing as a witness before the court upon behalf of the state.

600.6470. Fraud in connection with claim; forfeiture

Sec. 6470. Any person who corruptly practices, or attempts to practice, any fraud against the state of Michigan, in the proof, statement, establishment, or allowance of any claim or of any part of a claim, against the state, shall thereby forfeit the same to the state and it shall be the duty of the court of claims in such case to find specifically that such fraud was practiced, or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the state and that the claimant be forever barred from prosecuting the same.

600.6475. Actions involving negligent operation of motor vehicles or aircraft; defense of governmental function

Sec. 6475. In all actions brought in the court of claims against the state to recover damages resulting from the negligent operation by an officer, agent or employee of the state of a motor vehicle or an aircraft, other than a military aircraft, of which the state is owner, the fact that the state, in the ownership or operation of such motor vehicle or aircraft, was engaged in a governmental function shall not be a defense to such action. This act shall not be construed to impose upon the state a liability other or greater than the liability imposed by law upon other owners of motor vehicles or aircraft.

THE KU KLUX ACT

Commentary

On March 28, 1871, President Ulysses S. Grant sent Congress a special message urging the enactment of legislation to deal with "A condition of affairs. . . in some of the States of the Union rendering life and property insecure." The President was, of course, referring to the rising tide of terrorism in the southern states, led by the Ku Klux Klan (established 1866). The extent of such terrorism was fully documented in extensive Senate hearings. The type of testimony given in such hearings may be seen from the extracts contained in the speech of Representative William Stoughton [R., Mich.] early in the debate extracts that follow. Similar extracts were contained in the addresses of many Republicans, though, for our purposes, the Stoughton speech is enough to give the reader an illustrative idea of their flavor.

When the President's message was received, the House moved to take speedy action. Instead of the more elaborate measures that had previously been urged (notably a bill proposed by Congressman Benjamin Butler [R., Mass.] which had just failed to pass the House a year earlier), the House Judiciary Committee reported out a short bill, which contained the essential provisions of the law finally enacted as the so-called Ku Klux Act of 1871. The five sections of the original House bill were succinctly explained by Representative Samuel Shellabarger [R., Ohio] in introducing the measure in the lower chamber.

The Ku Klux Act, as introduced and ultimately passed, had two broad purposes: (1) to provide civil and criminal sanctions to deter infringements upon civil rights; and (2) to provide authority to the government to meet with force unlawful combinations and violence which interfered with civil rights or the execution of justice or federal law.

The first purpose was behind Section 1, providing for a lawsuit in a federal court by any person deprived of the rights given him by the Constitution or federal law or authority against any person who subjected him to such deprivation (such provision

still exists as 42 U.S.C. § 1983, and was derived from a comparable section of the 1866 Civil Rights Act); as well as Section 2 (which, in revised form, is now 42 U.S.C. § 1985), which provided for a criminal penalty against any person who committed a listed series of acts, ranging from conspiring to overthrow the government to deprivation or violation of constitutional rights, particularly those secured by the Fourteenth and Fifteenth Amendments.

The aim of providing the federal government with the authority needed to cope with mob violence was met by these two sections. The President had the power to use the armed forces to suppress any violence which deprived any class of people of their constitutional rights if the state authorities refused or were unable to protect such rights. He could also suspend habeas corpus. These provisions, in effect, gave the President the power to declare martial law in places where he deemed federal troops necessary to protect Negro rights, particularly the right to vote. The power thus granted was used by President Grant when, in October, 1871, he sent in troops to deal with the situation in nine South Carolina counties.

As was true of all of the post-Civil War civil rights legislation, the legislative proceedings leading to passage of the Ku Klux Act were essentially ratifications of what had already been decided upon by the Radical Republican leadership. This is not to say, however, that the debate itself did not go fully into the legal and other issues raised by the 1871 statute. As the Supreme Court has pointed out in *Collins v. Hardyman*, 341 U.S. 651 (1951), "The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse."

While Section 1 of the Ku Klux Act, by its terms, was limited in operation to persons who violated constitutional rights under color of state law, Section 2 imposed its criminal sanctions upon "any person" who so acted, regardless of whether his action was connected with action of the state in which he acted. This, of course, opened the door to opponents of the measure to contend that the law went beyond the constitutional language which, in the Fourteenth and Fifteenth Amendments, was limited to "state action" alone. The argument the other way proceeded upon the theory that state failure to act to protect constitutional rights furnished a sufficient basis for congressional action. In such view (best expressed in the remarks of Representative John Coburn [R., Ind.]) "state inaction" was elevated to the "state action" called for by the Fourteenth Amendment.

Congressional attacks were also made on the Ku Klux Act's provisions authorizing the President to use armed force and suspend habeas corpus. It was claimed that the Fourteenth Amendment provided no constitutional basis for conferring so far-reaching a power. Supporters of the bill relied here upon the notion that Congress could step in (even by so drastic a measure) when state failure to act resulted in a deprivation (even by otherwise private action) of constitutional rights.

* * *

The Ku Klux Act itself was passed by the House on April 6, 1871, by 118 to 91. It was passed by the Senate with amendments, on April 14, 45 to 19. The House refused to concur in the Senate amendments and a conference committee was appointed. The House refused to concur in the conference report, largely because it opposed a Senate amendment making cities and counties where violence occured liable in damages to those injured. The second conference committee watered down such provision to provide liability only for persons who knew of a conspiracy to violate civil rights and who could have prevented it. The second conference report was concurred in by both Houses on April 19, and the Ku Klux Act became law the next day.

FILED

No. 87-1287

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Michigan.

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Did Congress intend to include states and state officials in their official capacity in the meaning of the word "person" in §1 of the 1871 Civil Rights Act (currently 42 USC §1983)?

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STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1871 ("Ku Klux Klan Act") ("Third Force Act"); 17 Stat 13, ch 22, §1 (1871).

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication', and the other remedial laws of the United States which are in their nature applicable in such cases..."

Section 2 of the "Dictionary Act"; 16 Stat 431, ch 71, §2 (1871).

SEC.2. And be it further enacted, That in all acts hereafter passed words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non-compos, lunatic, and insane person; and the word "person" may extend and be applied to bodies politic and corporate, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and the word "oath" shall include "affirmation" in cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall include the word "affirmed."

Subsequently clarified in Revised Statutes §1 (1st ed 1874), and Revised Statutes §1 (2d ed 1878).

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fiveth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the

masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, noncompos, lunatic and insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Section 2 of the Civil Rights Bill of 1866; 14 Stat 27, ch 31, §2 (1866).

SEC. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

No. 87-1207

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE,
and
DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari
to the Supreme Court of Michigan.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The Michigan State Police were required by 1950 Michigan Public Acts, Extra Session, No. 38, 39 and 40 (Pet. App. 1a-7a) to compile information on, and to investigate activities pertaining to, broad and ill-defined areas relating to subversion and security. With the consent

of the Michigan Attorney General, these laws (popularly referred to as the "red squad" laws) were declared unconstitutional by a Michigan Circuit Court on February 3, 1976 in litigation unrelated to the instant case (Pet. App. 12a-13a), and were repealed in 1978.

The "red squad" records of Petitioner's brother were released to his brother in 1977. At that time Petitioner learned that because his brother's name had been in the files, Petitioner had not been considered by the State Police for a lateral transfer in 1973 from Administrative Analyst 11 at the Michigan Department of Mental Health to Data Systems Analyst 11 at the Michigan Department of State Police. Two months and seven days later, he had obtained a

Data Systems Analyst 11 position with the Michigan Department of Transportation.

When Petitioner learned in 1977 of the reason he was not considered by the State Police, he filed a Civil Service grievance that was originally denied because it was too late. He appealed this administrative denial to the Michigan Circuit Court, as is provided for by Michigan law. Michigan Attorney General Frank J. Kelley then entered the case for the state defendants and moved on March 31, 1978 for the return of the grievance to the Civil Service grievance system for a full hearing, which was ordered on June 26, 1978 (J.A. 13-14).

In November of 1978, Petitioner sued the State in a separate original action (J.A. 15-23) in the Michigan Court of Claims.[1] Paragraph 32 of Count I (J.A.

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[1]In the Michigan Court of Claims the sole defendant is the State of Michigan. MCLA

20) the only Count to survive various motions by the State in the Court of Claims (J.A. 24-30), set forth various allegations relating to the Michigan State Police and Petitioner's brother; then, in paragraph 33, Petitioner alleged

> "That the aforesaid compilation and use of the files of Plaintiffs brother was accomplished under color of State law contrary to 42 USC sec. 1983." (J.A. 20).

600.6419 (Pet. App. 16a-18a); MSA 27A.6419. Suits against state officials in their official capacities for retroactive damages are entertained in the Michigan Court of Claims because these suits are considered to be suits against the state itself. Michigan Compiled Laws Annotated ("MCLA") 600.2051(4); Michigan Statutes Annotated ("MSA") 27A.2051(4); "Actions to which this state ... is a party may be brought ... against the official capacity of an officer authorized to be sued in its behalf ...". Accord: Michigan General Court Rule 1963, 201.3(5) (Now Michigan Court Rule 1985, 2.201(C)(5)). See: Lowery v Department of Corrections, 146 Mich App 342, 348, 380 NW2d 99, 103 (1985), lv den 425 Mich 870 (1986); and Meda v City of Howell, 110 Mich App 179, 183, 312 NW2d 202, 203 (1981). Accord: Brief of Amici; pg 3, n. 2. See Argument II infra.

On June 10, 1980 the Civil Service Hearing Officer held, and the Civil Service Commission later upheld (J.A. 49-52), that although "Mr. Will was not one of the exemplary candidates in the field" for transfer (J.A. 47), the State Police use of the fact that his brother was indexed to the "red squad" files was a substantial factor in Petitioner not even being considered for a transfer, and this violated the 1963 Michigan constitution's prohibition in art 11, §5, para 6 on the use of "partisan considerations" in civil service transfers (J.A. 57). Petitioner was awarded back pay for the 2 months and 7 days until he had gotten a transfer at the same level to the Michigan Department of Transportation (J.A. 48).

Petitioner did not appeal the

grievance decision nor did the State. On July 22, 1981 the parties accepted the June 10, 1980 grievance decision as the factual premise for the Court of Claims proceedings (that had been joined with the Circuit Court proceedings. (J.A. 31-32)).

On September 10, 1981, Petitioner rejected the check for $201.60 for back pay proffered by the Michigan State Police on August 10, 1981.

In a December 15, 1982 opinion in the Court of Claims case, the judge held that the State is a "person" under 42 USC §1983. (J.A. 59-65). On December 30, 1982 judgment in the Court of Claims was entered against the Michigan State Police defendants.[2] (J.A. 66-68).

After a one-day bench hearing on dam-

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[2]The Circuit Court case was dismissed by Order of December 30, 1982 for lack of Circuit Court jurisdiction of a claim against the state. Petitioner did not appeal this dismissal by the Circuit Court.

Petitioner could have brought a cause of action for damages under 42 USC §1983 in the Circuit Court against State Police employees in their personal capacities, but he chose not to do so. Petitioner called these employees as witnesses in the Civil Service grievance hearing (J.A. 34, 37, 41, 42, 46, 47).

ages, the Court of Claims judge gave his opinion orally from the bench (J.A. 69-77) on March 8, 1983, then proceeded to award $153,232.14 damages in favor of Petitioner (J.A. 78-79).

In an appeal of right on the §1983 issue, the Michigan Court of Appeals on July 9, 1985 reversed the Court of Claims opinion, and held that the State is not a "person" under §1983 (App. to Pet. for Cert. 132a), but remanded to the Court of Claims for a determination of the liability of the Director of the Michigan

State Police in his official capacity (App. to Pet. for Cert. 133a). The Court of Appeals panel made a significant reduction in the damages awarded. (App. to Pet. for Cert. 134a-135a.)

On August 7, 1987, the Michigan Supreme Court, by a 4-2 decision, held that "the State is not a 'person' for purposes of a damage suit under §1983" (App. to Pet. for Cert. 9a) and that "A state official, when sued in an official capacity, is not a 'person' for purposes of a damage suit under §1983." (App. to Pet. for Cert. 9a). Two Justices joined in a detailed rationale (App. to Pet. for Cert. 18a-54a). Rehearing was denied on October 17, 1987 (App. to Pet. for Cert. 2a).

The petition for writ of certiorari was granted on April 18, 1988.

SUMMARY OF ARGUMENT

In order to determine the intent of the lawmakers, it is necessary to examine the words of §1 of the 1871 Civil Rights Act as well as the purposes of the law, the context, and the circumstances under which the words were employed. All of these factors support the conclusion that the 42d Congress did not intend to include states within the meaning of the word "person" and did not intend to subject states to this federal cause of action for damages in the states' own courts.

The mere use of the word "person" does not imply that states are to be included within the Act's ambit because it is a principle of statutory construction that in common usage the term "person" does not include the sovereign. The Dictionary Act

of the 41st Congress, Third Sess (February 25, 1871) was enacted two months before the 1871 Civil Rights Act and initially included "bodies politic and corporate" in the definition of "person", but was retroactively clarified in R.S. 1 to mean only "partnerships and corporations". This clarification was specifically designed to prevent application of the word "person" to state governments. The clarified meaning of the word "person" included local government units such as municipal corporations because they were "corporations" created by acts of their sovereign states. States were excluded because they were not "corporations", but were sovereign public bodies duly organized and admitted to the union.

The purpose of §1 of the 1871 Civil Rights Act was to permit a federal court action to protect federal rights, because state courts were being used to harass and injure individuals due to the inability or unwillingness of state authorities to protect constitutional rights or to punish violators.

Reconstruction brought about a basic alteration in the federal system, with the federal government established as the guarantor of the basic federal rights of individuals, but a deep respect for the sovereignty of the states was still the norm, with the federal government intruding only when state or local officials refused or were unable to enforce the laws. Had the 42d Congress intended to subject the states to federal

causes of action for damages either in the federal courts or in their own state courts under §1, it would have meant a radical change in the law as it was then understood.

In Quern v Jordan, 440 US 332, 343 (1979), this Court noted that members of the 42d Congress were well aware of the "importance of the states' traditional sovereign immunity" and observed that the absence of any mention of financial consequences to the states or of overriding the 11th Amendment is a "significant indication" of the legislative intent not to override the states' 11th Amendment immunity from suit in the federal courts.

Since Quern held that §1 does not override the states' 11th Amendment

immunity and the states therefore may not be sued in the federal courts, the question in the instant case is whether the 42d Congress intended to include the states within the meaning of the word "person" in §1 and to subject the states to this federal cause of action for damages in the states' own courts. There is nothing to be found from the sponsors or those speaking in favor of §1 to indicate that Congress had any such intention.

Given the common usage of the word "person", as well as an understanding of the context, the purposes of the law, and the circumstances under which the statute was enacted, it simply defies logic to believe that a Republican Congress in 1871 would enact, and a Republican president

would sign into law, a bill that would provide individuals with a cause of action to seek damages from the predominantly Republican state governments in the South in their own state courts while maintaining the prohibition against such actions in the federal courts.

If Congress today wishes to make the states civilly liable for damages on a federal cause of action under 42 USC §1983 it need only enact a definition of "person" that includes the states, and abrogate the states' sovereign immunity from suit. The fact remains that although Congress could have done so in 1871, it simply did not.

ARGUMENT

I.

THE 42D CONGRESS DID NOT INTEND THE WORD "PERSON" IN §1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE THE STATES.

A. BECAUSE THE ACT DOES NOT EXPRESSLY PROVIDE THAT STATES ARE "PERSONS" IT IS NECESSARY TO INTERPRET THE ACT, AND IN COMMON USAGE THE WORD "PERSON" DOES NOT INCLUDE A SOVEREIGN STATE.

In Monell v Department of Social Services of the City of New York, 436 US 658, 669, 689 fn 53 (1978), this Court found it "necessary" to interpret §1 of the Act because the Act itself "does not state expressly that municipal corporations come within its ambit" and because "there is no express reference in the legislative history to the definition of 'person'". The same difficulties exist in the instant case and the Court should apply the principles enunciated in

District of Columbia v Carter, 409 US 418, 420 (1973), in concluding that the District of Columbia is not a "state":

> "...'[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'"

Furthermore, because this case involves the possible application of a federal statute to a sovereign state, another important principle applies. In a case in which the Court held that the State of Iowa was not intended to be included within the meaning of "person" in relation to a 145-year-old statute concerning the burden of proof in a land dispute, the Court said in an 8-0 opinion:

> "'[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'...Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage....There is nevertheless 'no hard and fast rule of exclusion,'...and much depends on the context, the subject matter, legislative history, and executive interpretation." (citations omitted) (brackets in opinion). Wilson v Omaha Indian Tribe, 442 US 653, 667 (1979).

B. THE DICTIONARY ACT, 16 STAT 431, CH 71, DID NOT INCLUDE THE STATES WITHIN THE MEANING OF THE WORD "PERSON" IN THE CIVIL RIGHTS ACT OF 1871.

The present Chief Justice said in Monell v Department of Social Services of the City of New York, 436 US 658, 719 (1978) (dissent) that

> "Any analysis of the meaning of the word 'person' in §1983, which was originally enacted as §1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat 13, must begin...with the Dictionary Act."

The Dictionary Act was introduced in the 41st Congress, 3d Session, in 1871, to give guidance to a codification commission authorized by the 39th Congress to revise and consolidate the statutes of the United States. The Dictionary Act became law on February 25, 1871, and said in §2 in pertinent part:

"That in all acts hereafter passed ...

> the word 'person' may[3] extend and be applied to bodies politic and corporate ... unless the context shows that such words were to be used in a more limited sense; ...".

The Commissioners were required to "suggest to Congress such contradictions, omissions and imperfections" and "the mode in which they have reconciled, supplied, and amended the same". 14 Stat 74, ch 140, §3 (1866).

To make clear what had really been meant by the 41st Cong, 3d Sess, in the Dictionary Act, the Commissioners substituted "partnerships and corporations" in their revision for "bodies politic and corporate", saying:

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[3]The Court in Monroe v Pape, 365 US 167, 191 (1961), noted that "this definition is merely an allowable, not a mandatory one." The Court in Monell v Department of Social Services of the City of New York, 436 US 658, 689 n. 53 (1978) interpreted "may" to mean "shall".

"Substantially the same as section 2 of the Act of February 25, 1871, ch. 16, Stat. at L., substituting at the commencement the words 'In *** 1871,' for 'That in all acts hereafter passed;' also, substituting the words 'partnerships and corporations' for 'bodies politic and corporate.' The reasons for the latter change are that partnerships ought to be included; and that if the phrase 'bodies politic' is precisely equivalent to 'corporations,' it is redundant; but if, on the contrary, 'body politic' is somewhat broader, and should be understood to include a government, such as a State, while 'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, & c, appear to be excluded."

> Revision of the United States Statutes as drafted by the Commissioners Appointed for That Purpose. In Two Volumes. As Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress on the Revision of the Laws, p. 19 (1872).

Under 17 Stat 579, ch 24, §3 (Mar 3, 1873), the House Committee on the Revision

of the Laws "employed Mr. Durant, a lawyer of this city, to take this work and go over it and expunge from it everything in the nature of change; anything that altered the law in any particular from what it stood upon the statute-book. Mr. Durant went over the work for that purpose, and also arranged it in form to be presented as a bill before the House." 2 Cong Record, Part 1, 43d Cong, 1st Sess, 819 (Jan 21, 1874) (Sen. Poland). Mr. Durant retained the language "partnerships and corporations" substituted by the Commissioners for "body politic and corporate", and included it in HR 1215, 43d Cong, 1st Sess, that was enacted into law on June 22, 1874, and that was published under the provisions of 18 Stat 113, ch 333 (1874), as §1 of the

Revised Statutes (1st ed 1874), and §1 of the 2d edition of 1878[4], reading as follows:

> "In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February Twenty-fifth, Eighteen Hundred and Seventy-One, ... the word 'person' may extend and be applied to partnerships and corporations, ... unless the context shows that such words were intended to be used in a more limited sense; ...".

The Revised Statutes in §1 said that the clarified wording extended to "any act ... of Congress passed subsequent to February Twenty-Fifth, Eighteen Hundred and Seventy One ...". The Civil rights Act of 1871 was passed on April 20, 1871.

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[4]"[T]he printed volume [2d ed] shall be legal and conclusive evidence of the laws and treaties contained therein ...". 19 Stat 268, 269, ch 82, §4 (Mar 2, 1877).

C. IN 1871 CONGRESS DID NOT GENERALLY INTEND THE WORD "CORPORATION" TO INCLUDE STATES.

To the Congressmen of the Reconstruction era, a "corporation" was a creature of government, an artificial being, existing only in contemplation of law.[5]

This meaning of "corporation" included those entities that the Court in Monell v Department of Social Services of the City of New York, 436 US 658, 690 n. 54 (1978), called "Local government units which are not considered part of the State for Eleventh Amendment purposes", for the reason these "local government units" were

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[5]E.g.: Liverpool Insurance Co v Massachusetts, 77 US (10 Wall) 566, 574 (1871); Paul v Virginia, 75 US (8 Wall) 168, 181 (1869); and 2 J. STORY: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1687, p. 522 (3d ed 1858).

associations or communities of individuals (i.e. "corporations") created by acts of their sovereign states.[6]

By the standards of the Reconstruction era a state was not a "corporation", but was "a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." Texas v White, 74 US (7 Wall) 700, 720-721 (1868).[7]

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[6]E.g. Cowles v Mercer County, 74 US (7 Wall) 118, 121 (1868) (county); Owen v City of Independence, Missouri, 445 US 622, 639-645 (1981) ("municipal corporations".); Northwestern Fertilizing Co v Hyde Park, 18 F. Cas. 393, 394 (No. 10,336) (CC ND Ill 1873) (municipality); and 23 Op. Att'y Gen. 428, 430 (Mar 26, 1901) ("The word 'corporations' [in R.S. 1] may include municipal as well as private corporations. Hence the word 'person' may apply indifferently to either.")

[7]Accord: Scott v Jones, 46 US (5 How) 342,

This understanding of "state" is that which was used by most of the Congressmen who discussed "what is a state" in the debate on the 1871 Civil Rights Act. See: Representative Perry, Cong. Globe, 42d Cong, 1st Sess, ["Globe"] App 80 (March 31, 1871) (Using as the primary meaning the meaning given in "Texas vs. White, 7 Wallace, 720-721."); Representative Burchard, Globe App 314-315 (April 6, 1871) ("the whole body of the people, organized for political purposes

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376 (1847); The President, Directors, and Company of the Miners' Bank of Dubuque v State of Iowa, 53 US (12 How) 1, 6 (1851); 1 J. KENT: COMMENTARIES ON AMERICAN LAW 349 n. (c) (11th ed. Comstock, p 374, 1867); and A. CONKLING: A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES 139 (1864). See: Lowenstein v Evans, 69 F 908, 911 (DSC 1895) ("The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator.").

under a government to which powers have been delegated to act for and in the name of the whole."); Representative J. M. Leach, Globe 482 (Apr 5, 1871) ("It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive; these three are one, the State."). Senator Edmunds, however, in a discussion of the 14th Amendment, said that "A State is a corporation; ...". Globe 696 (Apr 14, 1871).[8]

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[8]Senator Vickers, to whom Petitioner makes reference on page 17 of his brief, opposed the bill. He argued that a State was a "body politic and corporate" in the sense of "what is a state", rather than in the sense of a state being included as a "person" within the bill. He was really objecting that one "body politic and corporate" [the federal government] cannot say of another "body politic and corporate" [the states] that the other "body politic and corporate" is not performing its duty to its own citizens. Globe at 661-662.

D. THERE IS NO INDICATION FROM THE PURPOSE, THE SUBJECT MATTER, OR THE CONTENT OF THE CIVIL RIGHTS ACT OF 1871, IN THE CONTEXT OF "THE EVENTS AND PASSIONS OF THE TIME AT WHICH IT WAS ENACTED",[9] THAT THE STATES WERE TO BE INCLUDED WITHIN THE MEANING OF "PERSON".

When Andrew Johnson became President on April 15, 1865, six days after Lee's surrender, Congress was in adjournment until December 4, 1865. Johnson's attitude was that "white men alone must manage the South."[10] The only major Congressional opposition in 1865 came from the "Radical Republicans", a minority who wanted black suffrage as a condition for the readmission of the former rebel states.[11]

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[9]District of Columbia v Carter, 409 US 418, 425 (1973).

[10]E. FONER: RECONSTRUCTION AMERICA'S UNFINISHED REVOLUTION 1863-1867, 180 (1988).

[11]Id at 178-179, 228-239 (1988).

Johnson's plan began to unravel, and opposition began to grow, as southern planters and former confederate leaders gained prominence in state governments, withheld political rights from the freedmen, denied them education, and enacted "Black Codes" that sought to coerce and control black labor and to put heavy political and personal restraints on blacks.[12]

Johnson continued to alienate Congress in 1866 by vetoing an extension of the Freeman's Bureau, entering into an impromptu 1866 Washington's Birthday

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[12]E.g.: K. M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877, 79-80, 102 and 110 (Vintage Books 1965). H. CARTER: THE ANGRY SCAR 52-54 (1959). W.E.B. DUBOIS: BLACK RECONSTRUCTION IN AMERICA 166-180 (1956). E. FONER, supra note 10, at 198-205, 207, 210, 214 and 225-227. Slaughter-House Cases, 83 US (16 Wall) 36, 70 (1873).

tirade against the Radical Republican leaders,[13] and vetoing the Civil Rights Bill of 1866, whose §2, when the veto was overridden, became the model for §1 of the Civil Rights Act of 1871.[14]

To try to put the fruits of the civil war (including the Civil Rights Bill of 1866 and the Freedman's Bureau Bill)[15] out of the reach of vetoes and shifting political majorities, and to "remove any vestige of doubt regarding power of the national government to protect the rights of Negroes and southern loyalists"[16]

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[13]K. M. STAMPP, supra note 12, at 112-113; E. FONER, supra note 10, at 249; H. CARTER, supra note 12, at 52-54.

[14]Quern v Jordan, 440 US 332, 341 n. 11, 362 n. 17 (concur in judg.) (1979).

[15]J. ten Broek: Equal Under Law (1965).

[16]H. J. Graham, Our "Declaratory" Fourteenth Amendment, 7 Stanford L Rev 3, 18 (1954).

Congress proposed a 14th Amendment on June 13, 1866.

As said by Professor Eric Foner in his recent RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988):

> "Yet if a degree of federal intervention in state affairs scarcely concedable before 1860 now became possible, few Republicans wished to break completely with the principles of federalism. Only if state governments failed to protect citizens' rights would federal action become necessary.... Most Republicans assumed the states would retain the largest authority over local affairs- in this, they followed the path marked out by the Civil Rights Act. But there was an important difference. The Fourteenth Amendment can only be understood as a whole, for while respecting federalism, it intervened directly in Southern politics, seeking to conjure into being a new political leadership that would respect the principle of equality before the law." pg 259.

President Johnson's denouncement of the proposed 14th Amendment plus a haranguing tour of the North by Johnson in

August and September of 1866, only exacerbated the split between the President and Congress.[17]

When Congress reconvened in December of 1866 with a more than 2/3 majority of Republicans, most of them anti-Johnson,[18] the Radicals seized the initiative,[19] with the moderate Republicans in Congress joining with the Radicals to produce state governments in the South that would seek to respect black suffrage, and seek to protect the rights of the freedman and of sympathetic whites.[20]

"[M]ost Republicans still believed the

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[17]E. FONER, supra note 10, at 264-265.

[18]K. M. STAMPP, supra note 12, at 117; E. FONER, supra note 10, at 267.

[19]E. FONER, supra note 10, at 273.

[20]E. FONER, supra note 10, at 277-278.

states retained rights beyond the scope of federal intervention, and expected the relatively rapid return of the Southern states as equal members of the Union."[21]

On March 2, 1867, the former rebel states were divided by Congress into military districts, 14 Stat 428, ch 153. On July 19, 1867, Congress stated that Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia did not have legal state governments, hence they were subject to the military commanders and to "the paramount authority of Congress." 15 Stat 14, ch 30 (Tennessee had been "restored" on July 24, 1866 (Joint Resolution 73, 14 Stat 364)).

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[21]E. FONER, supra note 10, at 277.

Having later met Congressional standards for readmission, the remaining rebel states were admitted with Reconstruction governments in 1868 and 1870.

In 1868 the Republicans came to power in most of the South,[22] and on March 4, 1869, Republican Ulysses S. Grant took the oath of office as President.

"Republican politics never escaped a 'colonial' pattern. Unable to establish their legitimacy in the eyes of powerful opponents, the new governments' survival ultimately rested on federal support."[23]

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[22]E. FONER, supra note 10, at 346. Amicii' argument I.B.1, pp 14-17, does not mention the transition in the governments of the former rebel states that is outlined in this brief.

[23]Id at 377.

These Republican state governments faced opposition not only from Southern Democrats who were seeking with varied success to wrest control,[24] but they also had to face the Ku Klux Klan and similar organizations.[25] The Klan was fighting a revolution, but the Republican state governments tried to achieve "stability through conciliation."[26]

Several of the former rebel states had passed anti-Ku Klux Klan laws,[27] but they were ineffective and enforcement was impossible. "[A] wave of murders and assaults were launched against both blacks

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[24]Id at 421-425, 440-442.

[25]Id at 342-343, 425-444, 454-459.

[26]Id at 444.

[27]Id at 438.

and Union sympathizers." District of Columbia v Carter, 409 US 418, 425 (1973).

Congress reacted with the "Force Acts". On May 31, 1870, the First Force Act, 16 Stat 140, ch 114, sought to guarantee the voting privilege to blacks in the Southern States with penalties for obstructing that right. Control was put in the U.S. Courts, with the President authorized to employ the land and naval forces. Section 18 of the 1870 First Force Act reenacted the Civil Rights Bill of April 9, 1866 (14 Stat 27, ch 31). See, also §§16 & 17.[28]

Nothing changed. Masses of reports came to President Grant from military

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[28]Civil Rights Cases, 109 US 3, 16 (1883); and L. TRIBE: AMERICAN CONSTITUTIONAL LAW 332 n. 11 (2d ed 1988).

officers in the South. Southern Governors and other civil officials appealed to the President. Petitions and sworn accounts were received by the President and forwarded to Congress.[29]

These reports brought forth a second "Force Act" on February 28, 1871 (16 Stat 433, ch 99), that amended and strengthened the First Force Act of May 31, 1870, particularly by strengthening enforcement powers in larger cities.

"Thus, at the opening of the 42d Congress [March 4, 1871], considerable apprehension was expressed by Republicans about the insecurity of life and property in the south...". District of Columbia v

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[29]Cong. Globe 41st Cong, 3d Sess 146 (Dec 16, 1870); and S. Exec. Doc. 16, 41st Cong 3d Sess (Part 1, Jan 13, 1871) (Part 2, Jan 17, 1871).

Carter, 409 US 418, 425 (1973).

The Court has succinctly described the conditions that existed:

> "[S]tate courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." Mitchum v Foster, 407 US 225, 240 (1972).
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> "... §1 of the Act ... was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others."
>
> "... the remedy created in §1 'was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" (emphasis in opinion). District of Columbia v Carter, 409 US 418, 426 (1973).
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> "Congress enacted §1983 in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." Felder v Casey, 56 USLW 4689, 4694 (U.S. June 22, 1988) (No. 87-526).

President Grant was skeptical of using the army to enforce racial justice, and he did not want to be charged with being a military dictator. The Congressional managers of legislation concluded that they could not put through any legislation relating to social justice without a strong call for it by the President.[30]

While President Grant was on his way by carriage to Capitol Hill to tell leading Congressmen that he could not endorse legislation that might result in the use of troops for its enforcement, George Boutwell, the Secretary of Treasury, tried to dissuade him. This effort, coupled with the recitations of

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[30]W. S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); A. W. TRELEASE, WHITE TERROR 387-388 (1971).

atrocities Grant heard at the Capitol, caused Grant to send a message on March 23, 1871, in which he asked for special help for the Restoration governments:[31]

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.
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> Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States...".

"Such legislation was deemed essential in light of the inability of the state

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[31]W. S. McFEELEY; GRANT: A BIOGRAPHY 369 (1981); and 2 G. S. BOUTWELL: REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 252 (1902). See, Monroe v Pape, 365 US 167, 172-173 (1961).

governments to control the situation. Five days later, Mr. Shellabarger of Ohio introduced the bill that eventually was to become the Ku Klux Klan Act [Third Force Act, or Civil Rights Act] of 1871." District of Columbia v Carter, 409 US 418, 426 (1973). The bill became law on April 20, 1871. 17 Stat 13, ch 22 (1871).

Although this volatile period of American history was a time of great turmoil and significant change, there is nothing in "the events and passions of the time" to indicate that Congress intended the 1871 Civil Rights Act to include states within the definition of "person" and to permit lawsuits against states in state courts.

E. THE LEGISLATIVE HISTORY OF §1 OF THE CIVIL RIGHTS ACT OF 1871 DOES NOT DEMONSTRATE ANY AFFIRMATIVE INTENT TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON", OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY IN THEIR OWN COURTS.

The Court has repeatedly pointed out that the purpose of §1 of the Civil Rights Act of 1871 was to open the doors of the federal courts to protect federal Constitutional rights.[32] Felder v Casey, 56 USLW at 4694.

The Court unanimously agreed in Kentucky v Graham, 473 US 159, 169 n. 17 (1985), that

> "The Court has held that §1983 was not intended to abrogate a State's Eleventh Amendment immunity. Quern v Jordan, 440 US 332 [345] (1979) ...".

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[32]"At the time this [1871] Act was adopted, it must be remembered, there existed no general federal-question jurisdiction in the lower federal courts. Rather, 'Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws.'" District of Columbia v Carter, 409 US 418, 427-428 (1973).

As the Court in Quern v Jordan, 440 US 332, 345 (1979) pointed out in its opinion, the Civil Rights Act:

> " ... does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the states; nor does it have a history which focuses directly on the question of state liability and which shows that congress considered and firmly decided to abrogate the eleventh amendment immunity of the states." Quern, supra, 440 US at 343, 342, 345.

Thus, since the doors of the federal courts were not opened by the 42d Congress in §1 to causes of action for damages against the State, and since state liability was not a focus of the debates, what Petitioner must find in the legislative history is an explicit affirmative showing of an intent by the 42d Congress to subject the states to a federal cause of action for damages in the states' own courts. There is no such

showing because it is not there to be found.

Professor Zagans made an in-depth analysis of every reference in the Congressional debates to §1, and found that

> "Debate on the bill was extensive. Over one hundred members of both houses presented speeches, most of them opposing passage. Only twenty-eight speakers, less than one-third of those addressing the Act, mentioned section 1. Of those, about half opposed the section; four who opposed the bill in general nonetheless approved of section 1." Zagans: "Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability, 71 Va L Rev 499, 549-550 (1985).

The legislative history has already been thoroughly examined in Monroe v Pape, 365 US 167 (1961); Monell v Department of Social Services of the City of New York, 436 US 658 (1978); and Quern v Jordan, 440 US 332 (1979).

Two extensive scholarly analyses (that do not rely on the Dictionary Act) have concluded that "person" in §1 did not include the states.

> Nowak: The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Columbia L. Rev 1413, 1464-1468 (1975).
>
> "At several times in the debates Congressman referred to the proposed legislation as punishing both individuals and states. Many of these statements, when taken out of context, might indicate that state governments were to be held financially responsible under what is now section 1983. However, when the speeches and debates are read in full, it becomes apparent that there was no such intention.... The proponents of the bill claimed that it was necessary to make state officers, and some private individuals, both criminally and civilly liable because those individuals were being left free to deprive innocent individuals of the rights protected by the Constitution. All of their defense of the bill relates to the necessity of punishing these individuals despite the fact that they often used language indicating 'the state'

> should be punished or held responsible." 75 Columbia L Rev at 1465-1466.
>
> "There is no indication that state governments were to be held civilly liable under what is now section 1983. Indeed Representative Bingham['s] ... final conclusion that the federal government could punish men and not states for a violation of its laws [Globe, App 85-86 (March 31, 1871)] seems to be of general application." 75 Columbia L Rev at 1467. Accord: Developments in the Law, Section 1983 and Federalism, 90 Harv L Rev 1133, 1155-1156 (1977).[33]

There is nothing from those legislators who spoke in favor of §1 to indicate that there was ever the slightest intention for §1 to include the states within the meaning of "person"; or to abrogate the states' immunity from suit in their own courts. What little relevant evidence exists seems to indicate that

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[33]Two extensive law review articles concluded that a state was a "person", but their methodology is negated by the fact that they relied on the Dictionary Act of February 25, 1871, without making any mention of its

Congress was concerned more with individuals than the states themselves.

For example, Representative Coburn, a Republican lawyer from Indiana, spoke of "terror, deceit, conspiracy, whipping, burning, torture, murder" (Globe, 456); said that "the offenders are not arrested, put on trial, or punished" (Globe, 457); gave long examples of outrage (Globe, 457-458); and argued that "The States cannot or do not act" (Globe 459). He then discussed towards whom the corrective action should be taken:

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subsequent clarification. Englander: Amenability of States to Section 1983 Suits: Reexamining Quern v Jordan, 62 Boston U.L. Rev. 731, 736-741, 751-759 (1982); and McBirney: Quern v Jordan, A Misdirected Bar to Section 1983 Suits Against States, 67 Calif L. Rev. 407, 422-427 (1979). The same would be true for the conclusion in Della Grotta v State of Rhode Island, 781 F2d 343, 348-349 (CA 1 1986), that also relied on the Dictionary Act without mentioning its clarification.

> "Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of habeas corpus, and substitute, generally, national for State authority. Can this be done? Or must the nation in every case of this kind deal with the State alone? Must we allow outrages to proceed till State authority is prostrated. It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the conditions of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government." Globe, 459 (April 4, 1871).

The others who spoke in favor of §1 were all Republicans and all lawyers: Representative Shellabarger, Globe App 68 (March 28, 1871); Representative Maynard,

Globe App 310 (March 30, 1871); Representative Lowe, Globe 374-376 (March 31, 1871); Representative Perry, Globe App 79 (March 31, 1871); Representative Wilson, Globe 481-482 (April 5, 1871); Representative Burchard, Globe App 312 (April 6, 1871); and Senator Edmunds, Globe 568 (April 11, 1871).

Nothing in Petitioner's brief demonstrates any Congressional intent to include states as "persons" or to override the states' immunity from suits in their own courts. Petitioner's legislative history arguments are either inconclusive or taken out of context and certainly do not demonstrate "explicitly and by clear language ... a history which focuses directly on the question of state liability and which shows that Congress

considered and firmly decided" to impose liability on states. Quern, supra, 440 US at 345.

Representative Shellabarger, a Republican lawyer from Ohio, was a member of the Joint Committee of 10 that prepared the legislation. He was the Representative who introduced the bill in the House. His comments concerning §1 on the introduction of the bill are directed almost exclusively to the authority of Congress to enact the legislation. The quotations from Representative Shellabarger which appear on page 12 of Petitioner's brief come from the Representative's discussion of §2 of the Act, not §1, with which we are concerned in this case.

Petitioner refers at footnote 9 on

page 14 of his brief to Representative Sheldon, but taken in its proper context, the reference is not to "the positive act or the default" of states, but of "state authorities". Globe 367-368 (Mar 31, 1871). The same footnote 9 refers to Representative Dawes who discussed §1 only in terms of individuals being taken into federal court, i.e. "him" or "he", not of states. Globe 476 (Apr 5, 1871). The remaining reference in Petitioner's footnote 9 is to one page of the six pages where Representative Garfield was speaking of the equal protection of the laws and how they can be enforced. In a passing reference to §1, he said:

> "This is a wise and salutory provision, and plainly within the power of Congress. Globe App. 153 (Apr 4, 1871).

Petitioner's other reference to Representative Garfield is at page 11 of

his brief in relation to the 14th Amendment, but the quotation is merely a part of Representative Garfield's long description of the added power given to Congress by the 14th Amendment as enacted, when compared with an earlier version that was rejected. Globe App. 150-153 (Apr 4, 1871).

The quote from Senator Edmunds at the top of page 13 in Petitioner's brief is from an extensive debate the Senator was having with Senator Thurman, who opposed the bill, on the authority of Congress to enact the bill. Senator Edmunds asked rhetorically how the 14th amendment was to be enforced, and said in part as the positive alternative:

> "Or, are you going to do it, as we by this bill do it under the fourteenth amendment, by declaring that ANY MAN who infracts that article shall be punished." Globe 696, (Apr 14, 1871) (emphasis added).

The last quote of Senator Edmunds by Petitioner is from the Senator's defense of the Sherman Amendment, which was later defeated.

On page 15 of his brief, Petitioner left out part of the quotation from Senator Boreman. The part left out is emphasized:

> "Would it not be the merest mockery to say that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied [sic] to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights to carry out the guarantee, to enable to them to enforce those rights? WHILE A POWER OF THIS SORT MAY LIE DORMANT SOMETIMES, AND WE MAY FIND THAT ONE WHO HAS BEEN INJURED AND WHO HAS BEEN DAMAGED CANNOT FIND ON THE STATUTE-BOOK A REMEDY PROVIDED, YET THE POWER IS THERE, AND IT ONLY REQUIRES THE ACTION OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT TO BRING IT INTO BEING, to provide the machinery in order that the injured person may secure his rights." Globe App. 229 (Apr 13, 1871).

What the Senator was saying in the part of the quotation left out by Petitioner is what the State of Michigan is arguing in this lawsuit: Congress' power under §5 is not always exercised to its full extent.

Petitioner makes four references to Representative Bingham, but once again leaves out a crucial part of a quotation. The full quotation from Representative Bingham, portions of which are found on pages 13-14 of Petitioner's brief, refers to "state officials" as those from whom relief is to be sought, as shown by the following emphasized words which were left out by Petitioner:

> "... The State never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; BECAUSE ALL STATE OFFICIALS ARE BY THE CONSTITUTION REQUIRED TO BE BOUND BY OATH OR AFFIRMATION TO SUPPORT THE CONSTITUTION. AS I HAVE ALREADY SAID, the States did deny to citizens the equal protection of the laws, ...". (Globe App. 85 (Mar 31, 1871).

Other references to individuals as those against whom relief was to be sought are found in Representative Bingham's six pages of discussion in the Congressional Globe:

> "In such case the nation would inflict the penalty for this crime upon individuals, not upon States." Globe App. 85 (Mar 31, 1871).
>
> "It is clear that if Congress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law." Globe App. 85-86 (Mar 31, 1871).

The Bingham quotation from page 81 of the Globe Appendix that is found on page 13 of Petitioner's brief is part of a discussion of the power of Congress. The part of the quotation that Petitioner left out says (emphasized):

> "THE QUESTION THEN, SIR, AND THE QUESTION NOW, IS, WHETHER IT IS COMPETENT FOR THE CONGRESS OF THE UNITED STATES, UNDER THE CONSTITUTION

> OF THE UNITED STATES, IN PURSUANCE OF ITS PROVISIONS, AND IN THE EXERCISE OF THE POWERS VESTED BY IT 'IN THE GOVERNMENT OF THE UNITED STATES OR IN ANY DEPARTMENT OR OFFICER THEREOF,' TO PROVIDE BY LAW FOR the enforcement of the Constitution ... on behalf of every individual citizen of the Republic ...". Globe App 81 (Mar 31, 1871).

The Bingham quotation from page 83 of the Globe Appendix that is also found on page 13 of Petitioner's brief relating to the powers of the states being limited, and to the powers of Congress being extended, through the 13th, 14th, and 15th Amendments, merely states the truism that Congress had a power that it did not have before the 13th, 14th, and 15th Amendments.

On page 15 of his brief, Petitioner refers to Senator Sumner, no specific quote being given. The discussion by the Senator in the Congressional Globe at

pages 650-651 was a general statement on the nationalization of the concept of equal rights.

Senator Trumbull, quoted twice on pages 14 to 15 of Petitioner's brief, was opposed to the bill, except for §1. The first quote is, again, only an extract that does not give the full import of the argument. Senator Trumbull was speaking only of federal power, not of "the machinery for doing it", as is shown below, with the words left out by Petitioner emphasized:

> "[T]HE FEDERAL GOVERNMENT CANNOT INTERFERE WITH THE STATES SO LONG AS THEY DO NOT DEPRIVE SOME PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW. IF THEY SHOULD, THEN THE POWER IS GIVEN TO THE FEDERAL GOVERNMENT TO correct that violation of the Constitution of the United States. IT MAY NOW prevent any State from depriving any person of life, liberty, or property without due process of law. I AM NOT NOW SPEAKING OF THE MACHINERY FOR DOING IT; BUT THE POWER IS NOW IN THE FEDERAL GOVERNMENT

> UNDER THE FOURTEENTH AMENDMENT TO PREVENT A STATE DOING WHAT NO STATE WOULD UNDERTAKE TO DO WITHOUT A VIOLATION OF ITS OWN CONSTITUTION." Globe 577 (Apr 11, 1871).

The second quote from Senator Trumbull that is found on pages 14-15 of Petitioner's brief is given to try to indicate an approval by the Senator of §1, but examination of the full context of the remarks shows that he was not referring to §1.

Representative Arthur, cited at page 15 of Petitioner's brief, spoke in the wildest hyperbole,[34] claiming that the "southern disorders" were mere allegations

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[34]"A cursory view of the legislative history of the Act shows opponents virtually apoplectic in their reaction to the legislation." Matascar: Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 Ark L Rev 741, 780 (1987).

intended by the Republicans "to divert the attention of the people from the abuses of the [Republican] Administration ...". Globe 364 (Mar 31, 1871); and that the pending bill was an "usurpation". Globe 365. Representative Arthur's examples of those subject to §1 were all individuals, i.e. Judges, court officers, legislators, Governors, and sheriffs. Globe 365-366.[35]

Senator Thurman, quoted on page 15 of Petitioner's brief, also spoke in hyperbole, claiming that §1 subjected legislators and judges to a suit in the U.S. District Court. Globe App. 217

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[35]The Court has cautioned against relying on the opposition when seeking the interpretation of a statute. National Labor Relations Board v Fruit & Vegetable Packers and Warehousemen, Local 760, 377 US 58, 66 (1964). ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

(Apr 13, 1871).

Petitioner claims that Senator Frelinghuysen spoke "in response" to the opponents. In the Senator's comments, the Senator was speaking of Presidential intervention, another aspect of the bill, not of civil damage actions. Globe 501. As the Senator said, following the quote given by Petitioner at page 15:

> "Placing the discretion as to the enforcement of the law with the President, and not with the Governor of a State or with a marshall, I see no peril." Globe 502 (Apr 6, 1871).

The Amici on pages 7-8 of their brief cite Representative Willard for the proposition that the states should be liable for failing to control private misconduct, if anyone was to be liable. Amici do not mention the paragraph that precedes the quotation cited by the Amici. In his

preceding paragraph, the Representative disclaims any Constitutional basis for his remarks.

> "Thus it seems to me - and, as I said before, I am only arguing this point in the light of Justice, and not as a strict question of constitutional law - that we are imposing upon a community ['city, county, parish, or any other subdivision of a State'] an obligation that we have no right to impose upon them, that in justice we cannot impose upon them ...". Globe 791 (Apr 19, 1871).

Petitioner concludes his Argument I.A. on legislative history with the claim that "§1 was intended to provide a remedy coextensive with the rights secured against the states by the Fourteenth Amendment, and that §5 of the Fourteenth Amendment was a sufficient constitutional basis for imposing such liability." But, since the 11th Amendment immunity of the States was not abrogated by §1 of the 1871

Civil Rights Act, it is obvious that §1 of the 1871 Act was not coextensive with the rights secured against the states by the Fourteenth Amendment. Section 1 could have been coextensive, and it can be if Congress chooses to enact legislation including states within the meaning of "person", and abrogating their immunity. But, as has been shown in this brief, the 42d Congress in 1871 did not choose to exercise its full power and include the states within the meaning of "person" in the 1871 Civil Rights Act.[36]

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[36]In the one hundred seventeen years since the Act's passage, Congress has declined to amend it to provide the relief Petitioner seeks. Two attempts have been made to amend 42 USC §1983 to include states within the meaning of "person". §§2(b) & 2(c)(2), S. 1983, 96th Cong, 1st Sess (Nov 6, 1979), and §§2(b) & 2(c)(2) S. 990, 97th Cong, 1st Sess (Apr 9) (Apr 10), 1981)). The bills never left the Committee. See, N. Sagafi-Nejad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 St. Louis U L. J. 373 (1983).

F. CONCEPTS OF FEDERALISM PREVALENT DURING RECONSTRUCTION SUPPORT THE CONCLUSION THAT THE 42D CONGRESS DID NOT INTEND TO INCLUDE THE STATES WITHIN THE MEANING OF "PERSON" OR TO ABROGATE THE STATES' TRADITIONAL IMMUNITY FROM ACTIONS FOR DAMAGES IN THEIR OWN COURTS.

Although Petitioner "readily concedes" that the Eleventh Amendment bars suits against states and officers in their official capacity in the federal courts (Petitioner's brief, p. 8), he devotes several pages of argument to the proposition that the Court's Eleventh Amendment jurisprudence is incorrect (Petitioner's brief, pp. 38-44). Respondents submit, however, that the authorities upon which Petitioner relies do not support his assertions and that the historical theory he espouses has been considered several times, but has never been adopted by a majority of the Court.

Pennhurst State School & Hospital v Halderman, 465 US 89 (1984); Atascadero State Hospital v Scanlon, 473 US 234 (1985); Welch v Texas Department of Highways, 483 US ____; 97 L Ed 2d 389 (1987).

Petitioner spends 13 pages of his brief (Arguments III and IV, pp. 32-44) to set forth the truism that Congress has the power under §5 of the Fourteenth Amendment to provide a federal cause of action against a state that may be exercised only in a state court. Respondents, on the other hand, have never disputed that Congress has such a power, but submit that the 42d Congress in 1871 did not in fact exercise that power in passing the Civil Rights Act.

Petitioner's argument relating to the concepts of federalism and state sovereignty are faulty in at least two respects: It fails to acknowledge important principles of federalism which were accepted by the Members of Congress who passed the 1871 Civil Rights Act and it fails even to recognize the existence of the doctrine of state sovereignty which prohibited suits against states in state courts, a doctrine of which the 1871 Congress was well aware.

At the time the 1871 Civil Rights Act was passed, the "reigning constitutional

theory" of the day was a doctrine of "coordinate sovereignty that ... placed limits on even the enumerated powers of the National Government in favor of protecting state prerogatives." Monell, supra, 436 US at 676; See, United States v Cruikshank, 92 US 542, 549, 550 (1876). Although the Civil War and Reconstruction undoubtedly brought about significant changes in the relationships between the states and the federal government, it nevertheless remained true that members of Congress in 1871 retained a deep respect for the sovereignty of the states. One aspect of this sovereignty was the well-recognized jurisprudential principle that a state may not be sued without its consent. This has been declared to be the

law in the federal courts, Hans v Louisiana, 134 US 1 (1890), and it is even more true in state courts. Beers v State of Arkansas, 61 US (20 How.) 527, 529 (1857):

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other without its consent and permission..."

See also, Bank of Washington v State of Arkansas, 61 US (20 How.) 530 (1857) and Railroad Co v Tennessee, 101 US 337, 339 (1879), where the Court said:

> "The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty."

Major legal treatises of the day also recognized this principle of sovereignty:

> COOLEY'S BLACKSTONE 155, n. 2 (1st ed 1871) ("A government is not liable to be sued in its own courts except by its own consent ...."); 1 J. KENT: COMMENTARIES ON AMERICAN LAW 297 n. (e) (11th ed, Comstock, p 316, 1867) ("A state cannot be sued in its

> own courts without its consent.... This is an attribute of sovereignty and of universal law. ... [N]o citizen of any of the United States ... can sue a state."); and 2 J. STORY: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §1687, p 521 (3d ed 1858) ("Thus, many states in the union, which have an interest in banks, are not suable even in their own courts.").

The principle of state sovereignty which prohibits suits against states in state courts is based upon the principle of sovereign immunity which is also exemplified in the Eleventh Amendment. In Quern v Jordan, 440 US 332 (1979), the Court rejected the contention that the 1871 Congress which passed the Civil Rights Act intended to abrogate the states' Eleventh Amendment immunity. The Court recognized that the members of the 42d Congress were fully aware of the "importance of the states' traditional

sovereign immunity", and after examining the words of the statute as well as the "logic, the circumstances surrounding the adoption of the Fourteenth Amendment, [and] the legislative history of the 1871 act" concluded that the Civil Rights Act:

> "... does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the states; nor does it have a history which focuses directly on the question of state liability and which shows that congress considered and firmly decided to abrogate the eleventh amendment immunity of the states." Quern, supra, 440 US at 343, 342, 345.

Section 1 of the 1871 Civil Rights Act was proposed and supported by Republicans for whom federalism was a basic concept and to whom federal action was called for only when state and local authorities failed to protect citizens' rights. If the 42d Congress in 1871 had intended to include the states within the meaning of

"person" in the 1871 Civil Rights Act, or to have the states be subject to an action for damages in their own state courts, they would also have made the states subject to a cause of action for damages in the federal courts by abrogating the states' Eleventh Amendment immunity. The State submits that the words of the statute, as well as the purpose, subject matter, and circumstances surrounding its passage, demonstrate that Congress chose not to provide such a broad remedy. Congress chose instead to provide a cause of action for damages against individuals and local government units acting under color of state law, but they chose not to include the states within the meaning of "person", not to abrogate the Eleventh Amendment immunity of the states in the

federal courts, and not to abrogate the immunity of the states from actions in their own state courts.

G. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT PETITIONER.

Petitioner's Argument concerning Monell does not distinguish between the sovereign states and their non-sovereign local governmental units, nor does it mention the rule from the decision of the Court pertaining to the State of Iowa in Wilson v Omaha Indian Tribe, 442 US 653, 667 (1979), that

> "'[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'" (brackets in opinion).

Furthermore, many of the cases Petitioner cites are misstated or incomplete and because this Court has never specifically addressed the question whether a State is a "person" for purposes of §1983, much of Petitioner's argument is based upon his inferences from what the

Court has not said in previous decisions. Such inferences are inappropriate since they disregard the principle expressed in Hagans v Levine, 415 US 528, 535 n. 5 (1974), that when questions have been passed on in prior decisions sub silentio, the Court is not bound when a subsequent case squarely presents them. The State submits that nothing in the Court's prior decisions compels the results Petitioner seeks.

In Lake County Estates v Tahoe Regional Planning Agency, 440 US 391 (1979), both California and Nevada filed briefs indicating that the Planning Agency was a political subdivision rather than an arm of either state. 440 US at 401. The Court clearly pointed out at page 401 that it was treating the Planning Agency as a

"political subdivision such as counties and municipalities".

Martinez v State of California, 444 US 277 (1980) (also cited in the Amici brief, pg 10, n. 21), had nothing to do with a §1983 cause of action against the State. Of the 5 causes of action in the lawsuit, two were common law actions against the state, and one (No. 5) was under §1983 against state employees in their individual capacities. 85 Cal App 3d 430, 434-436, 149 Cal Rptr 519, 522-523 (1978). The question presented to the Court, as set out in both the Appellant's jurisdictional statement at page 5, and the Appellant's brief at page 4, was "Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant to 42 U.S.C. §1983, For

Acts Which Caused a Loss of Life."

Maine v Thiboutot, 448 US 1 (1980) (similarly cited at pg 10, n. 19 & n. 21, of the Amici brief), was an administrative appeal against the State of Maine and the Commissioner of the Maine Department of Human Services which included an allegation under 42 USC §1983 in an amended complaint. The lower court ordered retroactive benefits for the Thiboutots, but denied retroactive benefits for the class and denied attorney's fees without specifying whether it was granting relief in response to the administrative appeal or to the §1983 count. The Thiboutots appealed. The State and the Commissioner did not appeal. 405 A2d 230, 232, 235, 238 (Me 1979).

The Supreme Judicial Court of Maine

held that state and federal courts have concurrent jurisdiction over cases under 42 USC §1983 (402 A2d at 235); that 42 USC §1983 covered violations of federal law as well as violations of the federal Constitution (405 A2d at 236); and that retroactive benefits for the class sought in the State court under federal law were barred by the state's "sovereign immunity" (405 A2d at 236-237). The Supreme Judicial Court of Maine held additionally that since the trial court had also awarded prospective relief, the plaintiffs had prevailed on a claim which was cognizable under 42 USC §1983, even though the court had not indicated that §1983 was the basis for judgment, hence the plaintiffs could be entitled to attorney's fees under 42 USC §1988, because 42 USC

§1988 was an action by Congress under §5 of the 14th Amendment abrogating the states' immunity. The Court affirmed, 448 US 1 (1980).

Kentucky v Graham, 473 US 159 (1985), held that fees could not be recovered from the state when state officials were prevailed against for damages in their personal capacities. 473 US at 167.

Edelman v Jordan, 415 US 651 (1974), was explained in Quern v Jordan, 440 US 332, 339 n. 8 (1979), as being decided on the basis that Ex parte Young, 209 US 123 (1908), permits enjoining state officials to conform their future conduct to the requirements of federal law; and that Ex parte Young permits prospective injunctive relief, but not a retroactive award which requires the payment of funds from the

state treasury.

Alabama v Pugh, 438 US 781 (1978), held that the 11th Amendment bars a §1983 action against the State. Implied from the language of the short opinion is the principle that if the state waives its immunity from suit in a federal court, thus giving the federal court a jurisdiction it would not otherwise have, the next question for the federal court would be whether a complaint under §1983 against the state sets forth a claim upon which relief can be granted. That is, once the hurdle of jurisdiction has been jumped, there still remains the hurdle of whether the 42d Congress intended to include the states within the meaning of "person" in §1 of the Civil Rights Act of 1871.

Of Hutto v Finney, 437 US 678 (1978), the Court in Kentucky v Graham 473 US 159, 170 (1985), said:

> "Hutto holds only that, when a State in a §1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because state officials properly were sued in their official capacity, fees may also be available from the State under §1988."

Hutto, as explained in Kentucky v Graham, is contingent upon the State being a "proper party defendant". This leaves open the question of when, if ever, is the state a "proper party defendant" in a §1983 action. The answer is -- not until Congress changes the meaning of "person" to include the states and also abrogates the states' sovereign immunity. As shown in this brief, Congress did not intend in 1871 to include the states within the meaning of "person" in §1 of the Civil

Rights Act or to abrogate states' immunity.

II.

A CAUSE OF ACTION UNDER §1 FOR DAMAGES AGAINST A STATE OFFICER IN THE OFFICER'S OFFICIAL CAPACITY IS A CAUSE OF ACTION AGAINST THE OFFICE, NOT AGAINST THE PERSON OF THE STATE OFFICER, HENCE IT IS A CAUSE OF ACTION AGAINST THE STATE, WHICH IS NOT A "PERSON".

Although it is undisputed that Petitioner could have sued the Director of the State Police under §1983 for damages in his individual capacity, Petitioner chose not to do so. In this action for damages only, Petitioner agrees at page 28 of his brief that the action was against the Director of State Police "in his official capacity". The Michigan Supreme Court had so found. App. to Pet. for Cert. 9a & 47a-48a.

Since 1838, the Court has held that an action against a governmental officer by his style of office, when a claim is made

against the officer entirely in the officer's official character or capacity, is an action against the governmental entity, not against the officer personally; that is, the action is against the office, not against the person. Governor of Georgia v Madrazo, 26 US (1 Pet) 110, 123-124 (1838):

> "The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.
>
> The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record.
>
> The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him, in that character, be supported."

Consistent with this concept that an action against a state officer in the state officer's official capacity is an action against the state office (the legal entity) held by the state officer, are a series of decisions since 1945 in which the Court has stated that an action for the recovery of money damages from a state officer in the state officer's official capacity is not an action against the state officer personally, but is an action against the state itself.

Ford Motor Company v Department of Treasury of the State of Indiana, 323 US 459, 463-464 (1945):

> "It is true the petitioner in the present proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who 'together constitute the Board of Department of Treasury of the State of Indiana.' But, they were joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought.... We have previously held that the nature of a suit as one against the state is

> to be determined by the essential nature and effect of the proceeding. [citations omitted]. And when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (emphasis added).

Pennhurst State School & Hospital v Halderman, 465 US 89, 101 (1984):

> "'[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.'"

Kentucky v Graham, 473 US 159, 165-166 (1985):

> "Official-capacity suits, in contrast [to personal capacity suits], 'generally represent only another way of pleading an action against an entity of which an officer is an agent...[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity....It is not a suit against the official personally, for the real party in interest is the entity....[A] plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." (emphasis in opinion).

Papasan v Allain, 478 US 265, 278 (1986):

> "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true if the relief is expressly denominated as damages....It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else." (e.g. "equitable restitution", "Edelman" [v Jordan, 415 US 651, 656 (1974)] 478 US at 280).

See: Monell v Department of Social Services of the City of New York, 436 US 658, 690 n. 55 (1978).

> "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent-at least where Eleventh Amendment considerations do not control analysis-...".

The few state cases that have been found from the period before Reconstruction support the proposition that an action against a state official in

the state official's official capacity is an action against the office held by the state official (that is, it is an action against the state); or, conversely, the prohibition on a state being sued in its own state courts without its consent may not be circumvented by bringing an action against an official. Auditor v Davies, 2 Ark 494, 504 (1840); League v DeYoung, 2 Tex 497 (1847).

The principle of these decisions is that an action for damages against a state officer in his official capacity is not an action against the state officer personally, but is an action against the state office held by the state officer, and the real party in interest is the state. Since, as has been shown in this brief, the state is not a "person" under

§1, there can be no cause of action for damages under §1 against a state officer in the state officer's official capacity. The fact that the real party in interest in the instant case is the State, which cannot be subject to a cause of action under §1983, differentiates this case from Brandon v Holt, 469 US 464 (1985), in which the entity which was the real party in interest was a municipality, which can be subject to a cause of action under §1983 after Monell, supra.

In a parallel development, another line of cases beginning in 1824 establishes the complementary principle that courts can exercise equitable jurisdiction over state officers sued for performing official acts that are alleged to be contrary to the Constitution or

federal law. The premise is that if the act is contrary to the Constitution or to federal law, then there was no authority for it, and the officer acted on her or his own; that is, she or he acted personally or individually, not officially. The Court said in Osborn v Bank of the United States, 22 US (9 Wheat) 738 (1824):

> "[T]he act is unconstitutional, and furnished no authority or protection to the officer who is about to proceed under it." 22 US at 838.
>
> "[T]he agent is not privileged by his connexion [sic] with his principal, ... he is responsible for his own act, to the full extent of the injury ...". 22 US at 843.
>
> "[I]f the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, ... [it will] furnish no authority to those who took, or to those who received, the money for which this suit was instituted."

The Michigan Supreme Court employed the same principle in Michigan State Bank v

Hammond, 1 Doug 527, 533-534 (Mich 1845).

The Court in more recent times has permitted such suits, almost always in an 11th Amendment context, where the official function of the state official is alleged to be unconstitutional, or to be illegal as a matter of federal law. The premise is that "any action by a state official that is purportedly authorized by that [state] enactment cannot be taken in an official capacity since the state authorization for such action is a nullity.", Papasan v Allain, 478 US 265, 276 (1986); and the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.", Ex parte Young, 209 US 12, 159-160 (1908).

The applicability of Ex parte Young is narrowly tailored to those prospective "[r]emedies designed ... to vindicate the federal interest in assuring the supremacy of that law.", Green v Mansour, 474 US 64, 68 (1985); or, put another way, "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" Pennhurst State School & Hospital v Halderman, 465 US 89, 105 (1984).

In Larson v Domestic & Foreign Commerce Corporation, 337 US 682, 690 (1949), the Court explained in a slightly different way why such suits were permitted:

> "[T]he conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference is that in this case the power has been conferred in form

but the grant is lacking in substance because of its constitutional invalidity."

In the circumstance of a state official being sued for prospective injunctive relief for performing an official function that is alleged to be a continuing violation of the Constitution or federal law, such a suit is not a suit against the state. Green v Mansour, 474 US 64, 68 (1985) ("Ex parte Young ... [asserted] that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); Kentucky v Graham, 473 US 159, 167 n. 14 (1985) ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State."); and Pennhurst State School & Hospital v

Halderman, 465 US 89, 102 (1984) ("[A] suit challenging the constitutionality of a state official's action is not one against the State.").

Despite Petitioner's argument on page 29 of his brief, Kenosha v Bruno, 412 US 507, 513 (1973), is not applicable since there will be no bifurcated definition of the word "person". This action, which seeks only damages from the "Director of State Police" in his official capacity, is not against the Director as a person, it is in reality against the Director's office, and since the real party in interest is the State, the action cannot be maintained.

In summary: An action for damages against a state officer in her or his official capacity is not an action against

the state officer, but is an action against her or his state office, i.e., it is an action against the state. A suit against a state officer for prospective injunctive relief for the continuing performance of an official function that is alleged to be unconstitutional or in violation of federal law is not a suit against the state.

CONCLUSION

For the reasons stated in this brief, Respondents respectfully request that this Court affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

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October Term, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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ARGUMENT

I. RESPONDENTS MISREAD THE "CONTEXT OF THE EVENTS AND PASSIONS OF THE TIME" IN WHICH SECTION 1 WAS ENACTED.

The foundation of the briefs submitted by Respondents and their amici is the assertion that state sovereignty was more important than civil rights to the Congress that enacted Section 1 of the Civil Rights Act of 1871 ("the Act"), an assertion totally inconsistent with the "context of the events and passions of the time" they invoke. Respondents' Brief ("RBr") 27. For the Republicans who wrote the Act, the basic fundamental civil rights of individual human beings were more important than state sovereignty. Reply Appendix (RA) 22a, 23a, 30a, 38a, 51a, 58a, 68a, 84a, 100a, 102a, 133a, 143a.[1] For them, this credal principle needed no more proof than the history of the preceding decade.

The Civil War itself was fought to subjugate state sovereignty to human rights. However, the battle for human rights had not ended at Appomattox. The unregenerate southern states responded to Emancipation with the notorious Black Codes. The Republican-dominated Congress countered by enacting the Civil Rights Act of 1866, conferring on the courts the two most potent judicial powers in order to protect human rights: the power to invalidate state laws which violated human rights (Section 1) and the power to punish any person, including the highest state officials, who sought to enforce such

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[1] The Reply Appendix contains an enlarged photographic reproduction of every passage in the Congressional Globe cited in Petitioner's Brief on the Merits, Reply Brief and in the briefs of Respondents and their amici, arranged in chronological order with marginal citations to the original Globe pages. A cross-index by name of speaker appears in the Table of Contents. (On pages 47-48 of their brief, Respondents refer to seven speeches made in support of the Bill without specifically citing or relying on any passage from these speeches; accordingly, the Globe pages cited therein are not reproduced in the Appendix.)

invalid laws (Section 2). The Federal Freedmen's Bureau vigorously began enforcement of the 1866 Act with a direct assault on the heart of states' sovereignty by preventing their officers from enforcing state laws and performing their official functions. State court judges in particular were arrested and prosecuted for such official acts as refusing to admit the testimony of blacks or imposing unequal punishment on blacks as mandated by state law. RA 121a, see also R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* 37-38 (1985). These prosecutions were clearly understood as a direct attack on the state itself; indeed state legislatures appropriated funds to pay for the defense of their judges. Kaczorowski at 29. Arguments about the power of Congress to interfere with state sovereignty, raised initially by way of defense in the courtroom, were quickly taken up by the Democrats on campaign platforms and in the halls of Congress.

Rather than back away from the confrontation with the states represented by the 1866 Act, Congress took an even more drastic step to make clear that state sovereignty was subject to civil rights: it passed the 14th Amendment and enacted the Military Reconstruction Act of 1867, which substituted federal military rule for the governments of ten southern states and conditioned restoration of statehood on ratification of the 14th amendment.[2]

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[2] Dimond, *Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 Mich.L.Rev.462, 478 (1982). Even the legal scholar upon whom Respondents primarily rely, RBr 44-45, agrees that at the time the 14th Amendment was ratified, "the concept of state sovereignty had no place in American political life." Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Col.L.Rev. 1413, 1463 (1975), *see* generally *id.* at 1460-63.

The adoption of the 14th Amendment brought an apparent victory for human rights in the closing years of the 1860s with an end to most overt official state deprivations of civil rights. However, the 1871 Congress was faced with a new problem: underground southern resistence led with flaming crosses and hidden under the hoods of the KKK.[3] It was Sections 2-4 of the Act that were designed to respond to this problem and thus were the focus of debate. Section 2 was aimed directly at the KKK, creating civil and criminal liability against entirely private persons who conspired to deprive citizens of their civil rights. Sections 3 and 4 authorized the selective displacement of state government by federal military rule in areas dominated by the KKK. In order to justify these sections, the Republicans needed to stretch their 14th Amendment enforcement mandate to cover *apparently private action which had the practical effect of destroying civil rights*. Their theory was ambitious and controversial: that disorder created by private persons but uncontrolled by state authorities was the equivalent of "state action" which deprived citizens of equal protection. In contrast, Section 1 of the Bill was uncontroversial precisely because it created liability for "pure" state action of the type found in this case: unconstitutional state legislation and actions pursuant to such legislation taken by state officers in an official capacity. See RA 45a-49a, 69a-72a, 96a-97a. Indeed, compared with the impact on state sovereignty of the 1866 Act, the Military Reconstruction Act of 1867, and the other sections of the 1871 Act, Section 1 was merely, as one proponent described it, "a mild civil remedy." RA 79a.

Therefore, in interpreting references to Section 1 in the debates, we must remember that the speakers were

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[3] One result of the KKK campaign was the Republican Party's loss of control over a number of state governments by 1871, thus removing the possibility of partisan sympathy for southern states among the proponents of the Act suggested by Respondents, RBr 14. See RA 12a, 151a.

almost always arguing for or against other sections of the Act. The proponents of the Act primarily discussed Section 1 as an irrefutable first step in an argument leading to the expanded notion of state action underlying Sections 2-4. They pointed out that it was both necessary and proper to extend liability for state action to individual state officials in order to reach the state. RA 80a-81a, 87a, 130a-132a.[4] Having then established that individuals *as well as* states could be the subject of 14th Amendment enforcement, they used Section 1 as a springboard to reach private individuals who caused the same type of harm as state actors. RA 86a. To defeat this logic, opponents of Sections 2-4 attempted to limit the concededly constitutional Section 1 to only conduct attributable to the state as a corporate entity, such as legislation. RA 47a, 106a, 111a, 112a, 128a.

Respondents would have the Court view this legislative history through the distorting lens of the *Ex parte Young* fiction and thus read the debates exactly backwards. The proponents did *not* justify Section 1 on a theory that they could only submit a state officer to liability if he were "stripped" of his official capacity. Just the opposite – it was their opponents who suggested the idea that a state officer loses his official capacity when he acts contrary to the Constitution, in order to break down the analogy made by the Republicans between the Section 1 and Section 2 and limit state action to conduct actually attributable to the state as an entity. The proponents' response was to *reject* a *Young*-type fiction and insist, by reference to the corporate concept, on an identity of state and officer, *especially* where, as here, the

[4] However, the proponents did *not* think that they were creating a remedy *only* against individuals as made clear by their assertions that the broadest terms were used in Section 1 because Congress had the *duty* to create a remedy coextensive with the full scope of 14th amendment rights. RA 52a, 74a, 75a, 76a, 99a, 122a, 124a, 132a, 146a. Cf. Senator Thurman's opposing speech, RA 121a.

officer enforces an unconstitutional law. *See* colloquy between Senators Thurman and Edmunds, 125a-132a.

A prime example of this "backwards" reading of the debates is found in the brief of the National Governors' Association et al ("NGA"), where these amici offer Representative Blair's speech as "powerful evidence" that "legislators asserted the bill was unconstitutional because the States were *excluded* from its proscriptions." NGA Br 20.[5] Blair objected to the Bill, *not* because he thought *Section 1 excluded states* – he explicitly presumed that it applied only to the states "in their corporate and legislative capacity or character and to those acting under their laws", RA 47a, 48a – but because *Section 2 included individuals* without linking their actions to state authority, RA 45a.[6]

Respondents and their amici borrow their "backwards theory" from a pre-*Monell* article by Professor John Nowak, in which he initially acknowledged that many of the statements in the debates "might indicate that state governments were to be held financially responsible under what is now section 1983." Nowak, *supra* n.2 at 1465. He attempted to refute this obvious reading, saying that it takes the statements "out of context." *Id.* However the "context" in which he placed the legislative history was based on the "backwards" interpretation of Blair, *id.*

[5] Despite their use of the plural, "legislators," the NGA amici only cite to a single sentence spoken by *one* legislator.

[6] The quote used by the NGA amici is "The language [of the 14th Amendment] is 'No State' shall do this or that. Individuals *nor a combination of individuals* are mentioned, and yet they are to be brought under the provisions of the bill and the 'State' is to be exempted." RA 46a (emphasis added). The phrase "a combination of individuals" clearly refers to the conspiracy language of Section 2, which does not apply by its terms to state actors.

at 1465 n.252, 1467, and on misreadings of three other quotes that refer to Section 2, not Section 1.[7]

II. RESPONDENTS MISCHARACTERIZE THE APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION.

Under a plain language reading, Section 1 clearly applies to the Director of Michigan State Police, as he is a person who under color of state law deprived Petitioner of rights secured by the Constitution. In seeking to avoid the plain language application of Section 1, Respondents also ask the Court to reject the two other most obvious

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[7] Nowak asserted that a statement by Rep. Bingham that "the federal government could punish men and not states for a violation of its laws seems to be of general application." Nowak at 1467. In fact, the context of the quote shows clearly that Bingham's use of "punish" was limited to the imposition of criminal penalties. RA 27a-28a. Bingham was obviously defending Section 2, the only section of the Bill at that time with penal provisions. His point was that in order for Congress to use the powerful deterrent force of criminal law, it was necessary to punish individuals since states as entities obviously could not be criminally prosecuted and imprisoned. Bingham made the same point a few paragraphs earlier in the same speech. RA 25a. Nothing in Bingham's speech supports Nowak's conclusion that Bingham saw the *civil* as well as the criminal sections of the bill as applying only to individuals. Nowak at 1465. Nowak made the assertion that whenever Bingham said "State" he really meant "individual," yet Bingham carefully and repeatedly referred to the bill as applying to individuals *and* States. See RA 20a, 21a, 23a, 24a, 26a. *Cf.* Rep. Poland, RA 148a. Nowak misread a similar statement by Rep. Burchard about needing to *punish* men, Nowak at 1466 n.254, which is also clearly a defense of the criminal penalties imposed on private individuals by Section 2. RA 86a. In Nowak's third quote, Nowak at 1467, also cited by Respondents, RBr 47, the speaker, Rep. Coburn, is arguing that opponents of the Bill should not oppose Section 2 because it reaches individuals, pointing out that "[t]o punish a particular individual [under Section 2] is less troublesome than to set aside a whole State government [under Section 3]." RA56a. *Id.*

guides to interpreting Section 1: its expressed purpose and the rules of statutory drafting in effect at the time. The explicit purpose of Section 1, stated in its title, was to enforce the provisions of the 14th amendment, provisions which refer only to "states." Further, the same Congress which enacted Section 1 only two months earlier declared by the Act of February 25, 1871, 16 Stat 431, ch 71, ("the Dictionary Act") that "person" presumptively included "bodies politic," which, as Respondents concede, was commonly understood to include states. See RA 106a, 111a, 132a. Respondents argue that the definition used by the 42nd Congress in 1871 should be ignored because the 43*rd* Congress amended the Dictionary Act in 1874. There is no evidence that the 43rd Congress intended to "retroactively clarif[y]," RBr 10, the scope of Section 1 by its amendment of the Dictionary Act.[8]

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[8] The 1874 amendment to the Dictionary Act was part of the massive reenactment of legislation which became the Revised Statutes of 1874. The Revised Statutes were debated only in the House, where the members of the Committee on Revision fervently assured Congress that the Revised Statutes were "an exact transcript, an exact reflex of the existing statute law," 43rd Cong, 1st Sess, Globe 646 (Rep. Poland), and that "there is not known to the committee a change of a syllable or of a comma of the statutes so as to change their effect," *id.* 820 (Rep. Hoar). The committee went so far to read on the floor of the House every section of the Revised Statutes where a language change had been made; although a change in the definition of "vessel" in the Dictionary Act was disclosed and debated, *id.* at 822-23, no mention was ever made of the deletion of "bodies politic" from "person." Respondents' only evidence of intent to change the definition of "person" is drawn from the *Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose* ("Commissioners' Draft"). As explained in the Official Introduction ("Introduction") to the Commissioners' Draft, that draft is *not* the legislative history of the Revised Statutes and indeed was *rejected* by Congress because it "included too many substantial changes."

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Even the 1874 definition was not "specifically designed to prevent application of the word "person" to state governments," as Respondents contend. RBr 10. The definitions of the Dictionary Act, both before and after amendment, were not exhaustive or exclusive; they simply listed certain meanings that are to be presumptively *included*. This Court has repeatedly found that states are included within statutory definitions of "person" substantially identical to the 1874 definition. *See Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *California v. United States*, 320 U.S. 577, 585 (1944).

Respondents attempt to invoke a "sovereign-exception rule of statutory construction", relying on *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). But Respondents fail to acknowledge the post-*Wilson* case of *Jefferson County Pharmaceutical Assoc. v. Abbott Laboratories*, 400 U.S. 150, 155-162 (1983) (State of Alabama is a "person" suable under the Robinson-Patman Act), in which this Court made clear that the sovereign-exception rule exempts only the sovereign that enacts the statute. *Id.* at 161 n.21 (no reason for extending the rule to exempt "a *state* from the otherwise applicable provisions of *an act of Congress*, all-embracing in scope and national in its purpose, *which is as capable of being obstructed by state as by individual action.*" *Id.* (emphasis added) (quoting *United States v. California*, 297 U.S. 175, 186 (1936). This Court

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RA 153a. The sole document submitted to the 43rd Congress was a later draft which purported to eliminate all substantive changes in prior law made in the Commissioners' Draft. 43rd Cong, 1st Sess, Globe 821 (Rep. Poland). See also *id.* at 826 (Rep. Lawrence). Therefore, if the legislative history indicates anything, it suggests that the deletion of "bodies politic" was a change made by the Commissioners that simply was not noticed by Congress. "As is noted in all standard treatises on legal bibliography, [the Revised Statutes] caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority." "Introduction," RA 152a.

expressly distinguished *United States v. Cooper*, 312 U.S. 600 (1941), relied on in *Wilson*, as a case where the exempted sovereign was the United States, 400 U.S. at 161 n.21, and held that even in the absence of any legislative history showing an intent to create liability against a state that the "plain language" of "persons" was broad enough to include states, *id.* at 157, 159 n.18.

III. THE EXISTENCE OF STATE COMMON LAW SOVEREIGN IMMUNITY IN 1871 SHOULD HAVE NO EFFECT ON THE PROPER CONSTRUCTION OF THE TERM "PERSON" IN THE PRESENT CASE.

The Michigan Supreme Court used a historically inaccurate picture of *Eleventh Amendment* immunity in 1871 to conclude that Congress intended to exclude state defendants from the "person" definition. See PBr 38-44.[9] Respondents make essentially the same argument utilizing an equally inaccurate version of *common law sovereign immunity* of states from suit in their own courts.

A. Common law sovereign immunity has never been understood to be a bar to a federal constitutional claim in state court.

There can be no doubt that under *current* law, state common law sovereign immunity cannot constitute a bar

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[9] Respondents misread this historical discussion as an argument that this Court's "Eleventh Amendment jurisprudence is incorrect." RBr 62. Petitioner does not argue that any of this Court's Eleventh Amendment decisions, past or present, are wrong. He argues simply that the *Hans* decision, by extending the sweep of that Amendment to bar federal constitutional claims by a citizen against his or her own state, was a *change* from what Congress would have understood the law to be twenty years earlier in 1871. If Petitioner is correct, then Congress could have felt no constitutional compulsion to exclude states from the definition of "person". None of these arguments challenge the propriety of *Hans* or of this Court's decision, in *Quern v. Jordan*, 440 U.S. 332 (1979), imposing a "retroactive" clear intent requirement for abrogating Eleventh Amendment immunity.

to a federal constitutional claim brought in state court. See *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980)("[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law.") See also *Monell v. New York Department of Social Services*, 436 U.S. 658, 695 n.59 (1978); *Owen v. City of Independence*, 445 U.S. 622, 647 n.30 (1981); *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2303, 2313-14 (1988).[10] It follows of course that a state's sovereign immunity – outside the context of the Eleventh Amendment – has no federal constitutional status. *Nevada v. Hall*, 440 U.S. 410, 414 (1979) (no source in any "express[] . . . provision of the Constitution" nor is it "implicitly" supported "by reference to the common understanding that no sovereign is amenable to suit without its consent").[11]

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[10] Indeed, in words particularly appropriate to the issue in the present case, this Court in *Martinez* went on to observe that "[a] construction of [§1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise . . . ." 444 U.S. at 284 n.8. Accord: *General Oil Co. v. Crain*, 209 U.S. 211 (1908) ("If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, . . . it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." 209 U.S. at 226. See also *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884) (state cannot take away remedies "for the enforcement of a [federal constitutional] right" since that would "take away the right itself"). *General Oil* was decided the same day as *Ex parte Young*, 209 U.S. 123 (1908), and it is significant that the Court saw no need to resort to the *Young* fiction.

[11] Of couse, if state sovereign immunity did have the constitutional status that the Eleventh Amendment enjoys, this Court could not have spoken of its confidence that "the judges who serve on the state courts" would enforce federal claims

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Repondents candidly admit that it is *their* burden to show that a *different* state of the law was a "well-recognized jurisprudential principle" in 1871. RBr 65. In fact, they cannot meet that burden.

It is important to emphasize that the only form of immunity that the 42nd Congress would have worried about in passing §1983 is a state's immunity in its courts from suit on *federal constitutional* claims.[12] In *Kawananakoa*

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against states that were barred in the federal courts by the Eleventh Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985). See also PBr at 34-35. Significantly, *Hall* was decided the same day as *Quern v. Jordan*, 440 U.S. 332 (1979), which dealt with the "*constitutionally guaranteed* immunity of the several States" from suit in *federal* court under the Eleventh Amendment. *Quern*, 440 U.S. at 342 (emphasis added). See *Hall*, 440 U.S. at 414 ("all of these [Eleventh Amendment] cases . . . concern questions of *federal-court jurisdiction* and the extent to which the states, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in *those* courts." *Id.* at 420-421 (emphasis added). *See also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99-100 (1984) (noting the special "problems of federalism inherent in making one sovereign appear against its will in the courts of the other", quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring); and *Employees*, *id.* ("issue of general immunity of the States from private suit [is] a question of the common law").

[12] Treatises espousing the principle of state sovereign immunity also contain strong statements regarding the supremacy of federal law that would be antithetical to the reach of sovereign immunity argued by Respondents. For example, Story, in the edition cited by Respondents, writing at a time when federal question cases were almost exclusively handled by state courts, observed that that head of jursidiciton "rests on the obvious consideration that there ought always to be some constitutional method of giving effect to constitutional

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v. Polybank, 205 U.S. 349, 353 (1907), Justice Holmes, citing Hobbes and treatises from the 16th and 17th centuries, observed that "[a] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right *against the authority that makes the law on which the right depends.*" (emphasis added). This means that a state is immune from suits for violations of rights of its own creation, but that immunity has no effect on suits for violations of rights created by a higher authority.[13] Significantly, in none of the cases cited by Respondents has this Court squarely held that a federal constitutional claim in a state court was barred by state sovereign immunity. See generally Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189, 262-265 (1981) (collecting and discussing cases).

A common law immunity from suit on federal constitutional claims would not likely have been well-established before 1871 for the additional reason that suits against states in state court for violation of federal rights before 1871 were rare. This was so because, before ratification of the Fourteenth Amendment, there were few

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provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them?" 2 J. Story, *Constitution of the United States* 1641 at 433 (3d ed. 1858).

[13] In 1868, Cooley explained how state sovereignty in a federal system is different than in a unitary system. He observed that sovereignty *usually* "extends to all the subjects of government within the territorial limits occupied by the associated people which compose it". T. Cooley, *Constitutional Limitations* 2 (1868). *"In American constitutional law, however,* there is a division of the powers of sovereignty between the national and State governments by subjects: the *former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and territories,* while the States have the like complete power, within their respective territorial limits, over other subjects." *Id.* (emphasis added).

federal constitutional limitations on the states and those that did exist usually arose in suits between private parties. See, e.g. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (Contracts Clause). Thus, Congress' efforts to enforce the prohibitions against states set forth in the recently-ratified Fourteenth Amendment involved a problem with little parallel in history.

Moreover, at least three successful Contracts Clause claims against states in state courts reached this Court during that time. See *New Jersey v. Wilson*, 11 U.S. (7 Cranch.) 164 (1812) (Marshall, Ch. J.)(suit in New Jersey courts to annul a tax assessment for its violation of the Contracts Clause); *Woodruff v. Trapnell*, 51 U.S. (10 How.) 190 (1850)(Contract Clause suit to compel officer of state bank to accept repudiated state bonds); *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853), discussed *infra* this brief, p. 17.[14]

In addition, as this Court explained in *Owen v. City of Independence*, 445 U.S. 622 (1980), the 42nd Congress would have known that, when performing governmental functions a *"municipality* was *an arm of the state,* and when acting in that 'governmental' or 'public' capacity, *it shared the immunity traditionally accorded the sovereign."* *Id.* at 644-645 (emphasis supplied).[15] If the very state sovereign

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[14] Indeed, success in state courts on federal claims was notable enough that this Court relied on those cases to bolster its conclusion that the *Eleventh Amendment* should not bar similar suits in the *federal* courts. In *Davis v. Gray*, 83 U.S. 203 (1873) (see PBr 40-41), this Court relied on *Woodruff* and *Curran*. See *id.* at 221. See also *id.* at 232 (citing *New Jersey v. Wilson*). *Davis* also relied on the fact that an identical action had been successfully prosecuted against the state of Texas in the *Texas* courts. See 83 U.S. at 222-223 and *Railroad Co. v. Comm. of Land Office*, 36 Tex. 382 (1872).

[15] See 18 McQuillin, *Municipal Corporations* 53.24 at 279 (3d ed. 1984). Michigan law is in accord. See *Nicholson v. City of Detroit*, 129 Mich. 246, 258-59, 88 N.W. 695, 700 (1902): "like the

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immunity under discussion was not enough to lead the 42nd Congress to exclude *municipal* agencies of the state from the definition of "person", then it is no reason for excluding *departmental* agencies and officers of the state, such as Respondents, from that definition.[16]

B. The 42nd Congress need not have expressed specific intent to override common law sovereign immunity in order to include state defendants within the term "person".

First, even though Congress knew that state "sovereign immunity insulates the municipality from unconsented suits", *Owen*, 445 U.S. at 647, no specific intent was required to find that they were "persons" in *Monell*. "By including municipalities within the class of 'persons' subject to liability for violations of the federal Constitution and laws, Congress – the supreme sovereign on matters of federal law – abolished whatever vestige of the state's sovereign immunity the municipality possessed." 445 U.S. at 647-648. For abrogation of *Eleventh Amendment*

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State, [municipality] enjoys immunity from responsibility in case of injury to individuals . . .. In imparting a portion of its powers, the State also imparts its own immunity." See also *id.* at 254 (city officers "do not represent the city, but the State.") citing *Murray v. Village of Grass Lake*, 125 Mich. 2, 83 N.W. 995 (1900). There is no doubt that most §1983 suits would involve governmental functions. The distinction between states and municipalities for Eleventh Amendment purposes, of course, was not made clear by this Court until 20 years after §1983 was passed. See *Lincoln County v. Luning*, 133 U.S. 529 (1890).

[16] Indeed, *Monell* drew support for its holding from the assumption that official capacity suits against state officers *were* encompassed within 1983. Under "dual sovereignty" concepts of the day, "there was no distinction of constitutional magnitude between officers and agents – including corporate agents – of the State: Both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power." 436 U.S. at 682. See also *id.* n.43.

immunity, simply "including [states] within the class of 'persons' subject to liability" under §1983 is *not* sufficient. See *Atascadero State School and Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Quern v. Jordan*, 440 U.S. 332 (1979) (discussed in PBr 36-37). Simple inclusion, without more, *is* sufficient to preempt the state's common-law sovereign immunity.

Second, since state sovereign immunity is like any other state-law based impediment to a federal claim, no special intent to abrogate is needed. There was no requirement that such specific intent be shown in *Testa v. Katt*, 330 U.S. 386 (1947) or any of the FELA cases in which this Court held state-law impediments to be preempted. See, e.g., *Brown v. Western Ry. Co.*, 338 U.S. 294 (1949). Indeed, given the wide variety and versions of state laws, procedures, doctrines, and policies that might potentially interfere with assertion of a federal claim in state court, it would be an impossible burden to require that Congress anticipate and specifically decide which ones it intends to preempt every time it authorizes a new federal claim. This Court has never imposed that requirement for FELA and other federal claims, nor has it done so for §1983. See, e.g., *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (state administrative remedy exhaustion rule); *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2302 (1988) (state notice-of-claim requirement); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (state prohibition against awarding attorney fees).[17]

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[17] In *Thiboutot*, this Court relied on very general intent regarding the applicability of §1988 in state court and apparently saw no need to respond to the comment of the Maine Supreme Court that "it seems extraordinary that Congress would enact a statute affecting the authority of states to control costs in their own courts without stating explicitly its intention to do so." *Thiboutot v. State*, 405 A. 2d 230, 239 (Maine Sup. Jud. Ct. 1979).

C. Congress could not have thought that a state's sovereign immunity barred a constitutional claim where, as here, that state's Supreme Court has determined that it does not.

As the opinion of Justice Boyle below notes, the Michigan Supreme Court abolished Michigan's sovereign immunity in *Pittman v. City of Taylor*, 398 Mich. 41, 247 N.W.2d 512 (1976). See Pet. App. at 106a.[18] Moreover, a majority of the Michigan Supreme Court below held that Michigan's sovereign immunity would, in any event, be no bar to constitutional claims for damages asserted against the state in Michigan courts. See opinion of Boyle, J., concurred in by Cavanagh, J., Pet. App. 109a, ("The primacy of the constitution must eclipse the power of immunity to countenance constitutional violations by the state without concomitant liability.") and opinion of Archer, J., concurred in by Levin, J., *id.* at 122a ("Neither sovereign immunity nor statutory immunity should bar relief when the state allegedly has violated the constitutional rights of its citizens.").[19]

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[18] See also *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961). There is some question whether Michigan's immunity from suit in its own courts even existed in 1871. See Cooperrider, *The Court, The Legislature, and Governmental Tort Liability in Michigan*, 72 Mich. L. Rev. 187, 187 (1973)(immunity "did not exist in 1850" and "was imported into the law of Michigan in the first two decades of the twentieth century"). Though the Michigan legislature has since *Pittman* and *Williams* established statutory governmental immunity, a majority of the Michigan Supreme Court below held that the statute "does not by its terms, declare immunity for unconstitutional acts by the state." See Pet. App. at 106a. Moreover, Respondents even "fail[ed] to argue that, assuming a constitutional violation has been alleged, statutory immunity bars recovery." Pet. App. at 105a.

[19] The reasoning used by the Michigan court would, of course, apply equally to federal and state constitutional claims. Cf. *Testa v. Katt*, 330 U.S. 386 (1947).

In *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853), this Court affirmed a state court's entry of judgment against the state on a federal constitutional claim in words that perfectly describe this case:

> That the State of Arkansas is capable of being sued, has been decided, after careful examination, by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold, in conformity therewith, that by its own consent the State had become liable to a decree in favor of the complainant in this suit, if the complainant has a valid ground entitling him to the relief prayed.

Id. at 309.[20]

IV. RESPONDENTS' APPROACH OF DEFINING "PERSON" IN TERMS OF ELEVENTH AMENDMENT OR COMMON LAW SOVEREIGN IMMUNITY IS UNSUPPORTED BY AUTHORITY AND IS IRRATIONAL.

A. Respondents' view results in improper bifurcation of a definitional term with no basis in history or reason.

Respondents' and their amici's argument necessarily contemplates that "person" will vary depending on the nature of the relief sought, a result at odds with the non-bifurcation rule of *Kenosha v. Bruno*, 412 U.S. 507 (1973) (see PBr 29). Not only are they unable to find any other instance where this Court has employed such an

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[20] Professor Hart has commented that, when state courts handle federal claims, "federal law takes the state courts as it finds them." Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954). Though the comment is usually argued (and rejected) as a justification for state procedural requirements that *limit* federal claims in state court, see, e.g., *Felder v. Casey, supra*, 108 S.Ct. at 2313, it provides a good rule for situations such as the present case, where the state court is *more* hospitable to the federal claim than the federal court can be.

approach,[21] in their effort to escape it, they adopt positions that are untenable.

First, they assert incredibly that *Ex parte Young*-type suits for prospective injunctive relief are "personal-capacity actions." NGA Br 30 n.20. But they do not explain how a later director of the Illinois welfare department can be held liable in his "personal capacity" for illegal action taken by a predecessor in office, see *Edelman v. Jordan*, 415 U.S. 651 (1974), *Quern v. Jordan*, 440 U.S. 332 (1979), and Pet. Br. at 28 n.17, or how the Governor of Michigan can be ordered in his "personal capacity" to draw millions of dollars from the state treasury. See *Milliken v. Bradley*, 433 U.S. 267 (1977). *Young*-type suits under 1983 can only be official capacity suits.

Second, Respondents seek to attribute to the 1871 Congress the modern distinction between prospective and retroactive relief, presumably asserting that Congress would have understood that it was authorizing only prospective official capacity liability when it authorized suits against "person" officers. To get around the fact that *Ex parte Young*, 209 U.S. 123 (1908), came 37 years after §1983 was debated, they assert that the *Young* fiction was really established much earlier. But if this is so, it was not reflected in the "restatement" of Eleventh Amendment law set forth in the substantially contemporaneous case of *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1873) (discussed PBr 40-41), which reflects a completely different theory. *Davis* observed the then-prevailing Eleventh Amendment titular-party rule under which official capacity suits were permitted against state officers and, notwithstanding the Eleventh Amendment, "the court may proceed to decree against the officers of the State *in all respects as if the State were a party to the record.*" *Id.*

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[21] *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), for example, would be of much more assistance to Respondents if it held that a bifurcated definition applied, e.g., that in a land dispute where *ejectment* is sought against it, the state is a "white person", but in a *trespass* action against it, a state is not a "white person".

(emphasis added). See generally Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study in Judicial Power*, 1983 Ill. L. Rev. 423, 428-431. A Congress with this understanding of Eleventh Amendment jurisprudence would have viewed its authorization of "an action at law [and] suit in equity" against "persons" acting "under color of" state law, as including official capacity suits against officers where the full impact of the judgment was to be borne by the state itself. See also Justice Powell's concurrence in *Monell*, 436 U.S. at 707 (quoted PBr 30).

B. Respondents' seek to create a form of "immunity" for state defendants that is broader than that provided by the Eleventh Amendment or common law sovereign immunity.

Respondents asserted below in defense that state sovereign immunity barred constitutional claims, but lost. See discussion *supra* this brief at 16. Respondents could not assert the Eleventh Amendment as a defense below since "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court". *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). What Respondents seek here is unfair "double-dipping": they want to be able to assert Eleventh Amendment and sovereign immunity as defenses for what they are *actually worth plus* some *erroneously broad* supposed 1871 version of those immunities *via* a redefinition of "person".

Whatever its feelings were about state sovereignty, the 42nd Congress surely was not *so* solicitous of states that it would have wished to give them *broader* protection from suit than the Eleventh Amendment or state sovereign immunity actually provided them at time of suit. Moreover, if, as Respondents assert, Congress believed that Eleventh Amendment or common law sovereign immunity *would* bar §1983 suits, it would have thought it *superfluous* to reflect those immunities in its definition of the cause of action. It is far more likely that the 42nd Congress sought, in framing §1983, to authorize a cause of action *simpliciter* against "persons" and assumed that,

if any of those defendants believed that Eleventh Amendment or common law sovereign immunity would bar the claim authorized, they could assert them in defense and the matter would be decided in *that* posture by the court handling the case.

In creating this cause of action, it is clear that the 42nd Congress was aware that there would be concurrent jurisdiction in state courts. The applicable rule then (as now) is that state courts have concurrent jurisdiction over federal claims "in every case in which they were *not expressly excluded* by the . . . acts of the national legislature". *The Federalist No. 82* (A. Hamilton) at 493 (Rossiter ed. 1961) (emphasis added). This very passage was even quoted during the debates. See Globe 661 (Sen. Vickers) RA 108a-109a; see also Globe 514 (Rep. Poland) and Cert. Pet. at 24.[22] There is no reason to think that Congress wished, in using the term "person", either to disrupt the usual way that defenses are asserted in courts or to expand their content. It cannot be reasonably maintained that either Eleventh Amendment or state common law sovereign immunity defense applies *directly* to bar the present claim. Respondents should not be allowed to maintain that they are nonetheless "immune" *indirectly* through a tortured redefinition of "person".

Respectfully submitted,

WILLIAM BURNHAM
Counsel of Record

CLARK D. CUNNINGHAM
PAUL D. REINGOLD

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[22] Moreover, Congress demonstrated its ability in the other post-Civil War civil rights acts to provide for exclusive federal court jurisdiction when it wished to do so and gave clear indication that it understood the precise difference between exclusive and concurrent jurisdiction. See Civil Rights Act of 1875, §3, 18 Stat. 335 ("the district and circuit courts of the United States shall have, exclusively of the courts of the several States, congnizance of all . . . violations of[] the provisions of this act"). See also Civil Rights Act of 1866, §3, 14 Stat. 27, ch 31.

REPLY APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1871 CITED BY PETITIONER, RESPONDENTS, AND RESPONDENTS' AMICI

MARCH 23, 1871

PRESIDENT GRANT'S MESSAGE TO CONGRESS REQUESTING EMERGENCY LEGISLATION

236 During the delivery of Mr. SCOTT's speech the following message was received from the President of the United States:

To the Senate and House of Representatives:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject on which I would recommend legislation during the present session.

U. S. GRANT.

WASHINGTON, D, C., *March* 23, 1871.

MARCH 28, 1871

INTRODUCTION OF BILL IN THE HOUSE
BY REP. SHELLABARGER

* * *

68A In my opening remarks upon this measure I shall not attempt to consider at all that state of the country which is supposed by a portion of the people, and by the President of the United States in his recent message, to require additional legislation of the kind provided for in this bill. I shall confine myself to a consideration of the qualities of this bill, its relations to the Constitution, our power to enact it, and, if I have time, the justness and wisdom of the measure.

In the first section of this bill it is provided—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which, as such citizen, he is entitled under the Constitution or laws of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, &c.

My first inquiry is as to the warrant which we have for enacting such a section as this. The model for it will be found in the second section of the act of April 9, 1866, known as the "civil rights act." That section provides

68A a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

The first inquiry, then, is naturally where is the constitutional authority, or, if you please, where is the constitutional impediment authorizing or preventing such legislation? It is absolutely plain that if it was constitutional to pass the second section of the civil rights bill, then it is equally competent to pass into law this first section of this bill. Why do I say that? Because the same exact right is involved in each case. The constitutional right upon which it was competent to enact the second section of the civil rights bill was this: the civil rights bill was passed to enforce the provisions of the thirteenth article of amendments to the Constitution of the United States—was passed in virtue of the two provisions of that thirteenth amendment, one of which reversed and overthrew the State constitutions creating slavery and prohibited the States from "denying" the slaves citizenship, turned them into citizens; and the other, being the second section

68A of that amendment, gave Congress power to enforce this first provision by "appropriate legislation;" or, in other words, to enforce the rights of citizenship to which the slave was admitted by the act of his emancipation.

That act, and I need not delay longer upon it, has already passed under the review of the supreme courts of at least three States of this Union, and I do not know of how many more; also under review of the circuit court of the United States of the district of Kentucky. Justice Swayne, in his opinion in that last-named case, an opinion exceedingly elaborate, exceedingly exhaustive, exceedingly able, sums up his conclusions by saying, "We have no doubt of the constitutionality of every provision of this act."

The exact legal effect of these decisions, sustaining the constitutionality of the civil rights bill, is to declare that the result of two constitutional provisions, one saying that the States shall not make citizens slaves, and the other saying that Congress may, by appropriate legislation enforce the first provision, is to authorize Congress to define and punish as a crime against the United States any act of deprivation of the rights of the newly made American citizenship. That is the point, effect, and result precisely of these adjudications. If that is law, then that is the end of the discussion as to the right of Congress to pass this first section, because, surely, if the thirteenth amendment did so much as this, the

68A far more explicit, complete, and careful provisions of the fourteenth much more did it by declaring all our people United States citizens; declaring that no State shall make or enforce any law abridging their privileges or immunities as such; declaring that the States shall not deny them equal protection of these equal laws, and then declaring that Congress shall have power, by appropriate legislation, to enforce the enjoyment of these privileges of citizenship by seeing to it that the laws do not abridge them nor the States withhold protection to them.

Then, Mr. Speaker, there is no doubt, there can be no rational doubt, of the right to enact the first section of this bill, provided the civil rights bill and the adjudications under that bill in the several States and in the circuit court of the United States be in accordance with a just judicial interpretation of the Constitution in that regard. And how can there be a doubt about a question like that? To say in our Constitution that all our people in the States shall be United States citizens, and also citizens of the States; to add this as a curative, new and additional part of the instrument, and in it to say that State laws shall not be made or enforced to abridge these rights of United States citizens nor the States deny protection of these rights under law, and that Congress may enforce these provisions securing these rights, and then to say that Congress can do no such thing as make any law so enforcing these rights, nor open the United States

68A courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd.

The section being in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights, it goes directly to the enforcement of that provision which says the State shall not make or enforce any law which shall abridge any privileges or franchises of citizens.

With these remarks in regard to the constitutionality of the first section, I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the fourteenth

68A amendment are wholly devoted to securing the equality and safety of all the people, as is this section, and, indeed, the entire bill. In deciding whether the section or the bill is warranted by this fourteenth amendment, ought not the fact that it is so eminently just and fair, so eminently in accordance with the spirit of our institutions, so wholly devoted to the single and sublime work of preserving the rights and liberties and government of all the people, and which gives not a power, except such as is, by the language employed, carefully confined and consecrated to the sacred duty of protecting the people and their Government, to have mighty weight in determining the question of the power to make it? Chief Justice Jay and also Story say:

"Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws."—1 *Story on Constitution*, sec. 429.

In the great case of Gibbons *vs.* Ogden (9 Wheat.) the Supreme Court were urged to decide that the powers held by the United States as against the States, in virtue of the clause giving power to make all laws necessary and proper to carry into execution the granted powers, were only such as would be given under a strict construction of these words. The words of Marshall in reply were: "There is not one sentence in the Constitution which prescribes this rule. We do not, therefore, think ourselves justified in adopting it." And it is with infinite force that Mr. Story reminds them who

throughout our history have striven to deprive
68A the United States of its just powers for the defense of the people and the Union, and to leave all power and sovereignty in the States, since the Union was formed "to establish justice, insure domestic tranquillity, to provide for the common defense, promote the general welfare, and to secure the blessings of liberty to the people and their posterity;" that—

"It would be mockery to ask whether these are odious objects." * * * * * "What peculiar sanctity have the State governments in the eyes of the people beyond these objects? Are they not framed for the same general ends? Was not the very inability of the State governments suitably to provide for our national wants, national independence, and national protection, the very ground-work of the whole system?"—1 *Story on Constitution*, section 415.

Surely, having in mind the beneficent purposes of the fourteenth amendment, and construing it in the light of these rules laid down by Marshall and Story, you do find in that amendment that power for protection of the citizens of the United States which this first section invokes.

I now come to the second section of the bill.

* * *

69A This, sir, is the foundation idea on which this section and the whole bill rest for their constitutional warrant. If right, it solves every possible doubt and difficulty in every part of this great inquiry. The United States added to its

69A Constitution what was not in it before; because never before was it found in the Constitution in express words that all people in this country were citizens of the United States as well as of the States. This was added, and added for a purpose.

But the addition did not stop there. It was also added that no State should make or enforce any law abridging those rights of citizenship then first declared by express constitutional enactment. But they did not stop there. In the abundance of caution they added that no State should deprive them of life, liberty, or property without due process of law. Nor did they stop there, but added that the State should not deprive any person within its jurisdiction of the equal protection of the laws. And they did not stop there yet, but in still more abundant caution added that Congress should have power by appropriate legislation to enforce these provisions. What provisions? Why, sir, the provisions that we are all citizens of one, and but one, Republic. More than that. That we all have, as such, privileges and immunities. More than that. These privileges and immunities shall not be abridged. More than that. That under the laws of the Union and the States there should be exact equality upon the face of the laws; they should not abridge rights. More than that. That under these laws, so equal, the States should not deny

69A equal protection. More than that. That Congress should have power to make laws appropriate to secure all that was meant by and included in all this more than trinity of "provisions" that we are all United States citizens; that our laws shall, as to us all, be equal: that we shall all have due process of law, and all equal protection under these equal laws.

Putting all these constitutional elements together, Mr. Speaker, where is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and guarantied and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship—to make laws abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

* * *

70A I must not, therefore, be told, as an answer to my argument, that there is no legislation executing those other provisions of the Constitution denying powers to the States, as, for example, those providing that no State shall make any law impairing the obligation of contracts or make treaties, and all those similar prohibitions. The fact that there has been no legislation upon those subjects, as I have already said, is simply because there has been no need of any. The decision of the Supreme Court of the United States, striking down the State laws which attempted to invade those provisions of the Constitution, ended the State legislation. But that would not do where personal rights were invaded by the States. Hence Congress has never hesitated to provide the necessary affirmative legislation to enforce the personal rights which the Constitution guaranties, as between persons in the State and the State itself. There is the distinction. In my mind our legislative and judicial history renders our position wholly impregnable. So long as your Constitution continues to guaranty the rights of American citizenship, so long you can "by law," to adopt the language of the fifth section of the fourteenth amendment, enforce these rights of American citizenship.

* * *

SPEECH BY REP. STOUGHTON IN SUPPORT OF THE BILL

* * *

Can any one, Mr. Speaker, contemplate these disclosures without surprise and well-founded
321 alarm? Yet, sir, the Democratic party have from the first denied, and then palliated and excused these outrages. In Tennessee and other southern States the laws which had been passed by Republican Legislatures to suppress and punish the Ku Klux were repealed as soon as the Democratic party came into power. The relation of the Democracy to this order is precisely that of the receiver of stolen property to the thief. The murder of leading Republicans, terrifying the colored population, and putting whole neighborhoods in fear so that the Ku Klux can control an election, is heralded as a Democratic victory.

For the purpose of showing that it is well understood where these outrages are committed that the Democratic party is willing and anxious to receive the benefits of murder and rapine, I cite the testimony of W. P. Bynam, the solicitor of the ninth judicial district of North Carolina, found on page 54 of the Senate report:

* * *

321 The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Goverr ment on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals. It is not a question of power or numbers. If the cowardly miscreants who conceal their crimes by hideous disguises, the dark pall of night and the darker pall of perjury, would give the loyal people of the South an open field and a fair fight they would protect themselves. But, sir, the Ku Klux system is ingeniously devised for the express purpose of enabling a few bad men to intimidate the masses of the people, to avoid any conflict with the military power, and to
322 control the State courts and local authorities by perjury and fraud.

* * *

MARCH 29, 1871

SPEECH BY REP. WHITTHORNE
IN OPPOSITION TO THE BILL

* * *

336 With courage, alacrity, and cheerfulness he went to work to repair his individual fortune, to build up waste places, to restore order, to aid his neighbor and the public; in fine, to perform all the duties of the laborious, useful, citizen. How was this spirit met? Pause and look at the picture. Special courts and tribunals, hitherto unknown to the law, were organized, and his rights made subject thereto. He was deprived of the right to hold office, even the most petty; he was cut off from the highest badge of American citizenship, the right to vote; all motives of individual exertion were taken away from him, and the negro, his inferior, invested with them and made his superior. In all this there was much to provoke him; yet, sir, he submitted. He saw his State government and its high offices, as well as its lowest tribunals, pass into the hands of parties who had no identity with the soil, the institutions, the property, or the people of the State; parties who, taking advantage of his weakness and the supposed hostility of the national Government to him, had organized the negroes into secret political clubs, holding out to them plunder of and dominion over him, inculcating them with the idea that the white man was their oppressor, and for hundreds of years had outraged them, thus raising the worst of passions; and who, by and through such machinery, had seized hold of the State governments; and

336 who, so possessing themselves of the State governments, for jobs and corrupt purposes and corrupt individual corporations, levied enormous taxes and created enormous debts; so that to-day the spectacle is presented of multiplied bankrupt States. Think for a moment, Mr. Speaker, of the volume of increased indebtedness and increased taxes put upon these people, and answer me, if it is at all wonderful that corrupt Governors should be impeached, that these people should be restive at the call of the tax-gatherer? Think for a moment of the condition of your American white brother, disarmed, lorded over by the ignorant, thriftless black, who, the slave and tool of miserable tricksters and plunderers, yet flaunts his freedom in that brother's face. Can you wonder that his blood will occasionally outrun his judgment?

* * *

MARCH 31, 1871

HOUSE OF REPRESENTATIVES

SPEECHES IN SUPPORT OF THE BILL

78A

Enforcement of Fourteenth Amendment.

SPEECH OF HON. A. F. PERRY,

OF OHIO,

IN THE HOUSE OF REPRESENTATIVES,

March 31, 1871.

The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. PERRY, of Ohio, said: ***

Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. The boasted courage of the South is not courage in their presence. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to

78A justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished. Such is a brief outline of the condition of things which we are called upon to meet.

* * *

81A

Enforcement of the Constitution and Laws of the United States and the Rights of the People.

SPEECH OF HON. J. A. BINGHAM,

OF OHIO,

IN THE HOUSE OF REPRESENTATIVES,

March 31, 1871.

The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. BINGHAM said:

Mr. SPEAKER: No man is equal to the task of discussing, as it ought to be discussed, the issue before this House within the limits of a single hour. I scarcely hope that I shall have done more than touch the hem of the garment of the argument when my hour shall have expired. But, sir, whatever I may fail to do, the great people behind me will not fail to supply. They, sir, constitute the tribunal before whom this issue is on trial.

81A It is the old issue with which the people have become familiar within the last ten years. It presents itself, sir, this day only in another form. In substance it is precisely the issue which was presented ten years ago upon this floor, and was discussed ably and exhaustively upon this side of the House and upon that. The question then, sir, and the question now, is, whether it is competent for the Congress of the United States, under the Constitution of the United States, in pursuance of its provisions, and in the exercise of the powers vested by it "in the Government of the United States or in any department or officer thereof," to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guarantied to him by the Constitution.

Until this issue was raised, in 1860–61, the constitutional power of Congress to provide for the common defense and the enforcement of the Constitution and laws of the United States had not been seriously questioned in this House. Now, as then, this power, essential to the nation's life and the safety of the people, is here challenged. It amazes me that, after all that has transpired in this country for the final settlement of this very question, gentlemen on either side of the House would dare to open it again. It has been settled by your courts of justice; it has been settled by the repeated action of your Congress within the

81A last ten years; it has been settled by the people themselves, by the ballot and by battle, by laws and by arms; and from their decision thus made there cannot rightfully lie an appeal. And yet gentlemen substantially again open this question to-day.

The question as presented here and now may be stated thus: is it competent for Congress to provide by law for the better enforcement of the Constitution and laws of the United States and the better security of the life, liberty, and property of the citizens of the United States in the several States of the Union? The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof. No man can successfully deny the power of Congress so to legislate, for it is expressly provided in the Constitution that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution" the powers therein expressly granted to Congress, "and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

* * *

82A Notwithstanding the express grant of power in the Constitution, and the rulings of Marshall, and this legislation of the First Congress, gentlemen still aver that Congress cannot constitutionally make laws to enforce the rights of the nation against either States or unlawful combinations of men.

* * *

82A Mr. Speaker, having said this much on this subject, I refer to the bill under consideration to say, that I do not propose now to discuss the provisions of the bill in detail. The bill incorporates in general the provisions, adapting them, however, to the existing condition of things, which have been law from the foundation of the Government, and to which I have referred. There may be provisions in the bill pending which are not necessary or proper. If there be, I shall ask the privilege, and I have no doubt it will be accorded to me, to attempt to amend by the favor of the House.

Of the general power of Congress to legislate for the better enforcement of all the powers vested by the Constitution in the Government of the United States, and for the better protection of the people in the rights thereby guarantied to them against States and combinations of individuals, I have no doubt, for the reason that it is a closed question, absolutely closed——

83A Mr. ELDRIDGE. Will I interrupt my friend——

Mr. BINGHAM. The gentleman will excuse me.

Mr. ELDRIDGE. I wish to ask him to apply that second section to his statement and see if it does conform to the provision of the Constitution——

Mr. BINGHAM. I have already stated, Mr. Speaker, that I have spoken of the provisions of the bill in general, and not in detail. I do not propose to be diverted from my line of argument. I have been endeavoring to demonstrate that the legislation of the country in all the past was an exercise of the general power to legislate as proposed by this bill. If it was competent heretofore to give the President power to enforce by arms the faithful execution of the laws against unlawful combinations of men, surely it is equally competent, to make the fact of such combinations a crime punishable in your courts. The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted. It is my purpose, as far as I may be able in the limited time allowed me, to make this statement good.

* * *

84A Mr. Speaker, this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guaranteed by the amended Constitution and expressly enumerated in the Constitution. Do gentlemen say that by so legislating we would strike down the rights of the State? God forbid. I believe our dual system of government essential to our national existence. That Constitution which Washington so aptly said made us one people, is essential to our nationality and essential to the protection of the rights of all the people at home and abroad. The State governments are also essential to the local administration of the law, which makes it omnipresent, visible to every man within the vast extent of the Republic, in every place, whether by the wayside or by the fireside, restraining him by its terrors from the wrong, and protecting him by its power, in the right.

Who is there here to say that any State ever

85A had the right to defeat the very object for which all government is made?

* * *

85A Sir, what would this Government be worth if it must rely upon States to execute its grants of power, its limitations of power upon States, and its express guarantees of rights to the people. Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial and punitive? Is it not better to prevent a great transgression in advance, than to engage in the terrible work of imprisonment, and confiscation, and execution after the crime has been done? Our fathers in the beginning set us the example of legislating in advance. Yet gentlemen say, now that the Constitution is amended and new powers have been vested in Congress, we must wait until these combinations are made. Why, sir, if we pass this bill and these offenses are not attempted or actually committed anywhere, no man is hurt, no State is restrained in the exercise of any of the powers which rightfully belong to it. Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to

85A citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

I respectfully ask my friend from Illinois [Mr. FARNSWORTH] to review all that he has said on this subject. If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down, and the Supreme Court of the United States was wrong every time this question has come before it.

Let gentlemen consider the last three amendments and the new limitations thereby imposed upon the power of the States, and the new powers thereby vested in Congress. The first of these (the thirteenth) provides that involuntary servitude, or slavery, shall not exist in

85A the United States. That is negative. Then we have the further provision that Congress shall have power to enforce, by appropriate legislation, this amendment. That is affirmative. Do gentlemen undertake to say to day that this does not impose a new limitation upon the power of the States, and grant a new power to Congress?

Does the gentleman from Indiana [Mr. KERR] wish to be understood as affirming that there is no new grant of power here to Congress and no new limitation on the States? I rather think not. Let any State try the experiment of again enslaving men, and we will see, whether it is not competent for the Congress of the United States to make it a felony punishable by death to reduce any man, white or black, under color of State law, to a system of enforced human servitude or slavery; that system which converts a man, endowed with immortal life, into a thing of trade, an article of merchandise, with no acknowledged rights in the present and no hope of a heritage in the great hereafter. In such case the nation would inflict the penalty for this crime upon individuals, not upon States.

Will gentlemen undertake to tell the country that we cannot enforce by positive enactment that negative provision, the thirteenth article of amendment?

We have fully considered the fourteenth amendment. We have seen that it expressly grants the power to Congress to enforce its provisions, all its provisions, by appropriate

85A legislation. Consider the fifteenth amendment, which declares, "No State shall deny to any citizen of the United States the right to vote on account of race, color, or previous condition of servitude." Here is a negative provision, a mere limitation, like the thirteenth and fourteenth amendments, on the power of the States, but coupled with a grant of power to Congress to enforce it. Did not a large majority of this House vote for the enforcement act of last May, which set aside the constitutions as well as the statutes of half the States of the Union because they denied rights guaranteed to citizens by this negative provision, and which also declared combinations in States to deprive citizens of their rights, felony, punishable in the courts of the United States? I undertake to say, as to those sections of that law which enforce this provision and define and provide for the punishment of conspirators against the guarantied rights of the people, that there has never been found in America, anywhere, a court weak enough or wicked enough to question their validity, not one.

I am not speaking of all the details of that act. I am speaking of the provisions of it which declare that the right shall not be denied, nor challenged, nor violated by individuals or States. What difference is there between enforcing the negative provision of the fifteenth amendment and enforcing a negative provision of the thirteenth and fourteenth amendments? There is no difference, sir. No man can find any difference. There the three new amendments stand, imposing limitations,

85A as I have said, upon the powers of the States which never were imposed on them before, and granting to the Congress of the United States express powers which never were in Congress before.

Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress to-day to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. It is clear that if Congress do so provide by penal laws for the protection of these rights, those violat-

86A ing them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law.

Mr. Speaker, I do not fear what the judgment of the people will be on this great question. I only regret that I cannot more fully discuss it or more clearly present it. I feel that my strength is well-nigh exhausted. I trust I have said enough to demonstrate the power of this Government to enforce the Constitution and protect the people in their rights of person and property.

* * *

86A Mr. Speaker, in this discussion I have been necessarily compelled to speak of the powers of the national Government and of the powers of the States, and have referred only incidentally to the provisions of the Constitution guarantying rights, privileges, and immunities to citizens of the United States. I pray, Mr. Speaker, that the House will not misunderstand me as placing the Government, either national or State, above the citizen. I ask the House, when they come to deliberate upon this question, not to forget the imperishable words of our great Declaration, "All men are created equal and endowed by their Creator with the rights of life and liberty." I ask gentlemen not to forget those other words of the Declaration, that "to protect these rights" (not to confer them) "governments are instituted among men." I ask gentlemen further, when they come to deliberate upon this ques-

86A tion, not to forget the words incorporated by its makers in the Constitution of our common country, by which it is declared that, to establish justice and to secure the blessings of liberty, "We, the people of the United States, do ordain this Constitution."

Liberty secured by law is not license. Liberty, our own American constitutional liberty, is the right "to know, to argue, and to utter freely according to conscience." It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give to every man his due. The justice to be established by the Constitution is the attribute of God, as to do justice is the perpetual obligation of men and nations. Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne.

Let equal and exact justice be established, that America may become the exemplar to all the nations of the world of the capacity of

86A man for self government, and in establishing it may illustrate the utterance of that grand intellect, Collard, of whom one of the most gifted of living men said:

"His words become indelibly engraved upon what ever spot they fall. 'The citizen,' said he, 'has a higher destiny than that of States.'"

* * * * * * * * * *

"'States are born, live, and die upon the earth; here they accomplish their destiny; but they contain not the whole man. After the citizen has discharged every obligation he owes to society, every obligation that he owes to the State, there abides in him the nobler part of his nature—his immortal faculties, by which he ascends to God, to a future life, and to the unknown blessings of an invisible world.'"

[Applause.]

SPEECHES IN OPPOSITION
TO THE BILL
REP. SWANN

* * *

362 The Freedmen's Bureau was a power. Governors of States were inaugurated without regard to residence or locality, having no common interests with those over whom they were called to preside. Bogus judges, who had never read the first page of Blackstone, dragged the ermine from the shoulders of those who had previously dispensed the laws. Strong-minded women, with assurance of reward, hurled their anathemas against treason and preached from the pulpit the duties of loyalty. Broken-down school-masters from the New England States, resurrected under the new dispensation, rolled about in their stately equipages. Property was

362 seized and appropriated without license, and the necessities of poor men, unable to help themselves, were levied upon by the tax-gatherer or the land shark. Such was a picture of the South under the tender guardianship of the Republican party.

* * *

362 Had these States been promptly reconstructed, as they should have been, how different would have been the picture to-day? Hundreds of millions of money would have been saved to the people, of which the Treasury would have received its fair proportion in imposts and taxation. For years past the people of the South have been resting with their hands before them in the expectation of a brighter future. They have become sick and disheartened. Their material interests have been neglected. Their great works of internal improvement, so necessary to their development, have been retarded and in many instances abandoned altogether. Immigration has ceased almost entirely. Capital, driven from their borders by the unsettled condition in which they are held, has sought other and more prosperous channels of employment. I feel that I am not without authority, therefore, in saying that the blighting policy of reconstruction, which has been so long persevered in by the Republican party from the close of the war to the introduction of the bill now before this House, has entailed a loss more than equal to the expenses of the war.

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REP. ARTHUR

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364 What, sir, is the meaning of this iteration? Why are the ultra-Republican leaders absorbing every hour and day of this Congress in agitating with the false clamor of Ku Klux? It is, sir, to divert the attention of the people from the abuses of the Administration of which they are complaining, and from the reforms which they are demanding. It is, sir, for the purpose of turning the adverse tide of popular elections in Republican favor. It is, sir, for the purpose of arbitrarily controlling or silencing the suffrages of the Democratic masses in the ensuing presidential election in the southern States. Desperate diseases, sir, require desperate remedies; and it is most obvious at the capital and through the country that the tumors and abscesses of the Republican party are rapidly encroaching upon the seat of its official vitality.

From the commencement of the present session of this Congress the gentleman from Massachusetts [Mr. BUTLER] vainly endeavored to introduce and bring forward his bill upon the subject of alleged disorders in the South. That bill was most atrocious in its character. It shocked every conservative Republican in this House, and many of the bolder sort hesitated to give it countenance. But, unabashed by all these unfriendly manifestations, the author adhered first to his bill and finally to the spirit and substance of it

364 (when he found he could not get its form and details) with the audacity, subtlety, and tenacity for which he is distinguished as a Republican leader. It seemed to us, on this side of the House, that the better genius of the Republican party would prevail, and that malevolence, factiousness, and imposture would be discountenanced.

* * *

365 Proposed legislation by Congress is properly subjected to two cardinal tests, namely: first, is it constitutional; second, is it expedient? I shall not now go into the constitutionality of this section. It is cumulative, as far as it goes, with certain provisions in the civil rights bill. The opinion of the country is formed upon that bill. I believe it to be a flagrant violation of the spirit and letter of that revered instrument. We are aware that it has undergone to some extent judicial construction in State and Federal judicatures; that its constitutionality has been affirmed on the one hand and denied on the other; and that the Supreme Court has not as yet, so far as I am advised, passed upon it. It is therefore an open question, and is at least of doubtful constitutionality, and therefore to be condemned.

But having the section subjected to the second cardinal test, to wit, is it expedient? it must upon the slightest reflection fall under the sternest condemnation of the jurist, the statesman, the philanthropist, of every lover of the divine and political axiom of peace and

365 good will to men. It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States, and then asserts over them an arbitrary and paramount control as of the rights, privileges, and immunities secured and protected, in a peculiar sense, by the United States in the citizens thereof. Having done this, having swallowed up the States and their institutions, tribunals, and functions, it leaves them the shadow of what they once were. They are nominally what they should be as of sovereign right. And so long as they remain servile, suppliant, and subservient, the mailed hand of central power is stayed. But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscru-

365 pulous adventurers or venal minions of power.

Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly or criminally, for judicial acts, and the ministerial agents of the law have been covered by the same ægis of exemption. Willfulness and corruption in error alone created a liability; and the judiciary has always

366 remained in justice and equity, in intellect and learning, in freedom and in courage, far, far uplifted above the turmoils, the passions, and the vicissitudes of parties and partisan creeds, the central orb of the highest civilization, and the sheet-anchor of law and order. But no tribunal is sacred in the eye of existing usurpation, and every character, however excellent, must go down under the baleful progress of despotic power. Under the provisions of this section every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread, and bent upon him the scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim.

But I can dwell on this section no longer, and I hasten on to section two:

That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United

366 States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court: *Provided*, That if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death: *And provided also*, That any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district.

This section, like the first, absorbs the entire jurisdiction of the States over their local and domestic affairs: the first section as to civil rights and remedies, and the second as to wrongs and punishments; and it broadly asserts the same exclusive and plenary authority and jurisdiction in Congress and the United States courts over these subjects in and over all the States which the Federal Government possesses over places acquired by the consent of the States "for the erection of forts, magasines, arsenals, dock-yards, and other needful buildings."

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SPEECH OF REP. SHELDON IN SUPPORT OF THE BILL

367 M. SHELDON. Mr. Speaker, in considering the bill which has been reported by the special committee of which the gentleman from Ohio [Mr. SHELLABARGER] is chairman, the question which meets us at the threshold is the constitutional power of Congress to enact it into a law. From the beginning of the Government to this day there have been disputes upon some question or other as to the extent of the powers of the General Government. Complaint on the one hand that the Government was a "mere rope of sand," and fear on the other of too much centralization, the tendency of every Government to increase its authority, and jealousy of the dignity and supremacy of the State governments, have kept the nation in a turmoil of disputations, without having fixed in the public mind the point where the authority of the State governments end and where that of the national Government begins. In consequence of our dual system it is probable that we shall always have conflicting opinions on this subject.

My fear of centralization and despotism is not so great as my apprehension of confusion and anarchy. The right to live, to own and possess property, and exercise the civil and political franchises, are the dearest interests of mankind, and it is the highest duty of the Government to provide means to protect and secure every citizen in the undisturbed enjoyment of these rights. The Government of

367 the United States was established not merely to declare the true principles of liberty, but to provide for their maintenance and perpetuation. It would be gravely defective if it were not empowered to enforce respect for all the declared rights of its citizens. The power to protect ought to correspond with the extent of the rights conferred. Whether the General Government possesses the powers which it seems it ought to possess is the question.

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367 The rights of the citizens have been more specially defined, if not enlarged, by the late amendments, and there is certainly conferred upon Congress the power to enforce them by legislation. It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States, and I believe that it can extend its powers,

368 through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities.

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SPEECH BY REP. LOWE IN SUPPORT OF THE BILL

* * *

374 That life and personal rights are insecure and systematically invaded in several of the States may be palliated, but cannot be successfully denied. The evidence is contained in the voluminous report of the Senate committee elicited from a crowd of witnesses; and it is also brought to us by the public press and by the mouths of those who speak of what they know and have seen.

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

* * *

APRIL 1, 1871

SPEECH BY REP. WADDELL
IN OPPOSITION TO THE BILL

* * *

377 I will describe to you in a few words the true condition of the people of North Carolina after the war, and their experience during the past five years of Republican rule, while under the absolute control of "the party of progress and great moral ideas," and I will say at the outset that no party in the history of this country ever had such an opportunity to perpetuate its power by intrenching itself behind impregnable lines, and no party ever so utterly wasted its opportunities and so covered itself with disgrace. Coming out of the great struggle like a strong man exhausted by fever, the State lay prostrate and helpless. I shall not insult the intelligence of the House by dwelling on the evils attending the annihilation of the entire labor system of a country at a single blow, nor shall I harrow my own feelings by a recital of the sufferings and humiliations to which our people were subjected. Suffice it to say that they presented a con-

377 dition which demanded, if not the experiment of active charity, at least the privilege of exemption from further molestation. They had complied with all that was required of them by the Government, and only desired to rebuild, as best they might, their waste places. The public debt of the State, principal and interest, was about seventeen million dollars, an immense sum to people so impoverished as they were.

* * *

377 They took charge of all the departments of the State government, and after multiplying officers *ad infinitum* under a constitution entirely new to the people; after wiping out the judicial system which had become venerable, and to which the people were attached, even descending in a spirit of petty revenge to the business of changing the names of localities offensively; after destroying the State University without substituting anything in its stead, and after many similar preliminaries, they increased the State debt at a single bound to the comfortable figure of $55,000,000 for the purpose of building railroads and developing resources generally—a legislative feat which was accomplished by the judicious expenditure of $200,000 by a loyal gentleman in the establishment of a free bar-room in the capitol, with peanuts thrown in. Ten millions of this debt having been declared unconstitutional by the supreme court, there was still left and now

377 stands a debt of $25,000,000. No railroad has been built, and the money was used by a loyal gentleman named Littlefield, from Pennsylvania, and an enterprising native named Swepson, partly I believe in buying out the State of Florida from a gentleman from Wisconsin.

SPEECH BY REP. SHOBER
IN OPPOSITION TO THE BILL

379

* * *

Sir, I repel the slanders which have been uttered here or elsewhere against them. They have suffered much; they have been despoiled of their political rights by strangers; they have been ruined, plundered, made bankrupt by a Government not of their own choosing, and placed over them by force; they have been outraged in their homes, in their property, in their honor; they have suffered by the hands of the murderer and the incendiary; they have borne such an accumulation of trials and burdens as would have driven any other people to desperation. And yet, sir, they have held their souls in patience through it all, and with a heroism beyond all praise have religiously kept the peace. There is not to-day a more orderly and law-abiding people anywhere than the people of North Carolina.

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SPEECH BY REP. LEWIS
IN OPPOSITION TO THE BILL

* * *

385 Mr. Speaker, it is not my intention to discuss at much length the constitutional questions presented by this bill, but I shall content myself with a few general observations on that branch of the subject; for its palpable violations of that instrument have been clearly shown by gentlemen who have preceded me. This bill is but a continuation of the series of acts passed by Congress since the war, forming a code of laws, in my judgment, without example for injustice and intolerance in any representative Government. Though of a kindred nature, it is in advance of any step yet taken toward the final result contemplated, which is, in my opinion, nothing less than a consolidated despotism here at the capital, and the absorption by the Federal Government of all the rights and powers of the States, if not an obliteration of State lines.

Sir, this bill is a systematic and apparently studied attack upon our form of government. It destroys essential and necessary safeguards to the life and liberty of the citizen. It ignores the sovereign rights and nullifies the laws of the States, though passed in obedience to the Constitution, and puts in jeopardy the officers of the States, though in the conscientious discharge of their duties, and lodges in the hands of the President powers that cannot be safely intrusted to him or any other one man.

385 By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties, though simply executing the process of a State court, about which he has no discretion, and the legality of which he has no right to question.

By the second section the Federal Government ousts the States and assumes jurisdiction of offenses committed within the limits of the States, which have heretofore been left in their exclusive control, and the control of which the Constitution has denied to the United States. * * *

SPEECH BY REP. BLAIR
IN OPPOSITION TO THE BILL

208A

Now we have these three amendments before us, and we will concede that there is power given the General Government in the amendments to enforce them. But, Mr. Speaker, the question is, what power is vested in the General Government over the subject-matter of those amendments? Whatever power is given to the General Government is simply adequate to and commensurate with the amendments; that is to say, to enforce that which is established or that which is prohibited, and nothing more. To do this, Congress must act upon and against that power, person, or thing that

208A can successfully violate the provisions of the amendments.

What is there established by the thirteenth amendment? The liberty of the slave. We have him changed from the condition of slavery to that of liberty. Who is it or what is it that can return the slave back to bondage again? Whatever it is or whoever it is that has the power to return the slave to bondage, then against that power, person, or thing is given to Congress the right to legislate, and against no other. What is it, then, that can remand him back to slavery? Is it the individual act of any one man? Can one or two men, or a dozen men, or fifty men, or a hundred men, by murdering or mistreating the colored people who were slaves return them into bondage again? Why, sir, it is absurd and preposterous to so assert. Nothing but the sovereign power of the State in which he lives can again remand or attempt to remand him to slavery. And hence, whatever power is vested in the United States Congress must be exercised against the State governments and those acting under their laws, and not against individuals who may act without the authority of such laws. Individuals alone cannot enslave.

And so with the fourteenth amendment. It provides that these same persons who once were slaves shall be citizens of the United States and of the States. Who can deprive them of citizenship? Can one or more individuals do it? So with the other provisions contained in the first section of said fourteenth amendment: no State shall deprive any per-

208A son of life, liberty, or property, &c.; and no State shall deny to any person, &c., the equal protection of the laws. The language is "No State" shall do this or that. Individuals nor a combination of individuals are mentioned, and yet they are to be brought under the provisions of the bill and the "State" is to be exempted.

The same may be said of the fifteenth amendment. It enfranchises the colored people and gives them the right to vote; the language is positive and plain:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

Here again the inhibition is against the "United States" and the "States." Individuals and persons are not named, and yet they are to be brought under the provisions of the amendment and this bill, and the "United States" and the "States" go free. Is not this most singular legislation—the parties against whom the provision is made left out of the bill, and those not named put in it?

The inhibitions in the amendments against the United States and the States are against them in their corporate and legislative capacities, for the thing or acts prohibited can alone be performed by them in their corporate or legislative capacities.

Again, I ask, can individuals in a State without the aid of State law enslave a colored man? If not, Congress has no jurisdiction over them under the thirteenth amendment.

208A Can individuals take from the colored man his "citizenship?" If not, then Congress has no jurisdiction over them under the fourteenth amendment. Can individuals take the right to vote from the colored man, which was conferred by the Constitution of the United States? If not, Congress has no jurisdiction over them; for surely Congress could not be guilty of legislating against those who are incapable of violating the amendments and fail to legislate against those who can.

As the States have the power to violate them and not individuals, we must presume that the legislation provided for is against the States in their corporate and legislative capacity or character and those acting under their laws, and not against the individuals, as such, of the States. I am sustained in this view of the case by the tenth section of the first article of the Constitution of the United States. In it are a number of inhibitions against the States, which it is evident are against them in their corporate and legislative capacity; and to which I respectfully call the attention of the gentlemen who favor this bill.

If no State, in its corporate capacity or character, is trying or threatening to legislate the colored people back into slavery; if no State is trying to legislate citizenship away from the colored people—and no State is trying to legislate the right to vote away from the colored people—I would not only ask whence the authority for Congress to pass this bill, but whence the necessity for it? Not only is there not any evidence before us, but no one dare arise on

208A this floor and assert that any State in this Union has or is about to deprive or abridge the colored people or white people of any rights guarantied to them by the thirteenth, fourteenth, and fifteenth amendments or any other provision of the Constitution of the United States. "No State shall do this," as remarked by the gentleman from Illinois, [Mr. FARNSWORTH.] This whole legislation must be directed against the States, and not against individuals. It may be contended that the expression "no State" means the same as "individuals." If so, then the States and the United States were with Walker in his filibustering raid into Central America; and also in Canada in the late Fenian raids. But the tenth section, article one, Constitution of the United States, referred to, forever settles what is meant by the expression "no State."

* * *

209A Now, sir, with these remarks before us, I shall hasten to the consideration of the bill. Having shown that the thirteenth, fourteenth, and fifteenth amendments are simply inhibitions of power to the States to legislate, I will now examine the bill by sections, and see how it conforms to those amendments. The first section provides—

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United

209A States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress," &c.

The first part of this section seems to contemplate that some State has or is about to legislate so as to abridge the rights conferred by the thirteenth, fourteenth, and fifteenth amendments upon the negroes; but it includes the whites also. As those amendments only apply to those that were slaves and not before citizens, and to the colored persons not before voters, to include any others than them is an assumption of power.

Provisions made to protect negroes in their freedom, citizenship, and right to vote should not be construed to give Congress the power to legislate over assaults and batteries and violations of State election laws. But, strange to say, such is the effect of this section. But as no State has or is likely to pass any such law as contemplated, that section is and will be inoperative, and hurt no one. It is only the assumption of power that I protest against.

We shall now notice the second section.

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APRIL 4, 1871

SPEECH BY REP. BUTLER
IN SUPPORT OF THE BILL

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448 HAS CONGRESS THE CONSTITUTIONAL AUTHORITY TO PASS AND CAUSE TO BE EXECUTED SUCH LAWS?

I do not propose in the fragment of an hour to enter upon the argument of this grave constitutional question. It could not be properly discussed if I devoted the whole time allotted to me; and I am specially debarred from such an undertaking by the learned and able discussion of the two gentlemen from Ohio, [Messrs. SHELLABARGER and BINGHAM,] and my own colleague, [Mr. HOAR,] who said all that could be said upon that subject in the time given to them. But every gentleman should in the quiet of his study carefully examine it, and thus easily satisfy himself. For one, I have no doubt upon it, after much careful and deliberate thought and study of the question, although the Democratic teachings of my early life had trained my mind to lean heavily against any invasion by Federal authority of the peculiar and proper rights of the States.

I may be permitted, however, to give some conclusions to which I have arrived without any considerable detail of the reasoning which led to them.

There seem to me two controlling propositions on this question.

First. If the Federal Government cannot pass laws to protect the rights, liberty, and lives of citizens of the United States in the States,

448 why were guarantees of those fundamental rights put in the Constitution at all, and especially by acts of amendment?

All agree that the mere constitutional assertion of affirmative guarantees not made operative by law, are ineffectual to aid the citizen. How, then, can the citizen avail himself of those constitutional guarantees and affirmative declarations of his rights, if Congress cannot pass laws to make them operative? How can it be an interference with the rights of the States for the laws of the United States to afford that protection to its citizens which the State fails or neglects to do for itself?

Is it one of the rights of a State not to protect its citizens in the enjoyment of life, liberty, and property, and thereby deny him the equal protection of the laws, so that, when the General Government attempts to do for the protection of the citizen what the State has failed to do, is it to be held an interference with the rights of the State? Pardon me; it seems to me that such action is only a necessary and proper interference with the wrongs of a State. A State has no constitutional or other right reserved to itself to deny or neglect to its citizen the equal protection of the laws.

Secondly. If the General Government has not the constitutional power to protect the lives, liberty, and property of its citizens upon its own soil when such protection is needed, then it ought to have such power; it should reside somewhere in the Government. For without the power to protect the lives of its citizens,

448 **a republican government is a failure, and if such be constitutional law, to be a citizen of the United States is to be the most unprotected of all mankind.**

* * *

448 Let me put a case, not altogether a supposed one, to illustrate the absolute absurdity of the doctrine that the Federal Government cannot constitutionally interfere on its own soil to protect the liberty and lives of its citizens.

A British subject is teaching a negro school in Georgia, and is seized, scourged, and imprisoned by a Ku Klux Klan. Demand is made by the queen's Government on ours for his release and indemnity for his wrongs. Under the law of nations and by our Constitution the whole power of the United States, civil and military, must be set in motion at once, if need be, to compel his release, and an appropriation must be made to make good his losses. The failure so to do would be a just cause of war, and we should not do to other nations what we demand at the cannon's mouth they shall do to us. So that under the Constitution, as read by these gentlemen, the rights of a foreigner, when infringed in one of the States, can and must be protected by the whole power of the United States, while our Government is constitutionally impotent to shield its own citizens under like circumstances. Can the absurdity of a Virginia constitutional abstractionist even further go?

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SPEECH BY REP. COBURN
IN SUPPORT OF THE BILL

456 * * *

These men, unwilling to resort to reason, to persuasion, to the power of good example, to the gentle arts of peace, to obtain supremacy, still use the old and vulgar weapons of terror, deceit, conspiracy, whipping, burning, torture, and murder. They have learned no good principles from their hard experience; but, dogged, sullen, deceitful, revengeful, and degraded, they will still struggle against destiny and fight the God of the Universe.

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457 **Since its suppression we have drifted back to the old position; but find an altered state of circumstances, an unusual condition of society. We find that the commission of a certain class of high crimes is not noticed; that the offenders are not arrested, put on trial, or punished, as may best suit the people in certain districts; that there is no liberty of speech or suffrage and no protection to life and property in those places to all equally. We find that, in consequence of the rebellion and the acts of reconstruction, there is a persistent, organized effort to overthrow the law by secret crimes and by systematic perjury in cases**

457 of arrest and trial of those committing them, thus eluding the officers of justice. We find a society, with well-known names, such as the Ku Klux Klans and the White Brotherhood, with officers, with obligations of secrecy, with a large membership, numbering thousands, extending over counties and over States, whose object is to perpetrate these crimes and to screen from punishment others who are guilty. We find that this society is political in its nature, is exclusive in its membership, and is utterly hostile to the Republican party and to the Union of the States, and that its victims are members of that party.

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459 The development of this condition of affairs was not the work of a day or even of a year. It could not be, in the nature of things; it must be slow; one fact to be piled on another, week after week, year after year. At first these masked men seemed to be perpetrating jokes upon the emancipated negroes. Then occasional outrages were revealed. Public attention was arrested, and at length hundreds of cases were chronicled; and a singular feature connected with them was that the civil authorities seemed utterly powerless to obtain convictions for any crimes, however atrocious. All these things could not happen without concert, understanding, and arrangement. It could not be possible that all should be acquitted who were arrested. It could not happen that in some localities a vast number of these crimes

459 were committed and no one arrested. It could not happen that Union men should invariably be the victims and their opponents in politics the wrong-doers. It could happen that Union men who spoke out their sentiments freely should be banished or whipped or burned out or murdered. These things do not occur thus accidentally. It does not merely happen that men who stand by the country and who opposed rebellion and treason should in the administration of justice get none whatever. It does not happen that large classes of men are deprived of the protection of life, liberty, and property without redress and without notice.

Such occurrences show that there is a preconcerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception.

What, then, can be done? The States cannot or do not act. Some other power must be invoked. Where does it reside? How can it be exercised? Can it be made effectual? These are questions of the gravest import and which are forced upon us by the present circumstances.

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459 It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution. So far it has not been found necessary to do this; but the emergency has at last arisen, and there is but one course to take. How can this thing be done? Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less

radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of *habeas corpus*, and substitute, generally, national for State authority. Can this be done? Or must the nation in every case of this kind deal with the State alone? Must we allow outrages to proceed till State authority is prostrated? It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the condition of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government.

459 In my judgment Congress has both remedies, and can use both or either as the emergency may require. In the matter in hand it is proposed to try the simpler remedy first. Should that fail, a more thorough course is to be adopted.

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459 Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed. In what other aspect does the power of this nation shine with more benignity? How much better this than the array of armed men, the suspension of civil process, the dread alternative of force!

460 Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so. That is the head and front of our offending. We believe that the effect of this measure will be to restore peace and overawe the conspirators.

460 We believe that the ruffians who prowl in darkness will take warning. We believe that they will vanish, as the birds of night do at the coming sun. We believe that the terrified and humbled friends of the Union will lift up their heads, confident of future safety. We believe that the officers of justice, shielded by the national power, will proceed promptly, without fear or favor, and that the trembling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought themselves, equal protection to all.

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SPEECH BY REP. GARFIELD
IN SUPPORT OF THE BILL

* * *

150A

FIRST SECTION OF THE FOURTEENTH AMENDMENT.

I now come to consider last in order, for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter.

150A No thorough discussion of this clause is possible which does not include a history of some of the leading facts connected with its origin and its adoption by Congress. I will therefore state briefly the proceedings of this House on the first form of amendment proposed on the subject embraced in the first section of the fourteenth amendment, as it now stands in the Constitution.

THE REJECTED AMENDMENT.

On the 13th February, 1866, Mr. BINGHAM reported, from the joint Committee on Reconstruction, a joint resolution proposing the following amendment to the Constitution of the United States:

"ARTICLE —. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property."

The debate proceeded at great length, and the necessity for increased protection to those who had lately been slaves, against the hostile legislation of the States, was strongly urged. I will quote a few paragraphs from the debate, to show some of the leading reasons that were urged for and against the proposition.

Mr. Higby, of California, insisted that this amendment was necessary in order to protect the lives and property of the citizens in the South. He showed how, under the thirteenth amendment, the laws of the States might be so administered as to put black men into slavery under pretense of sentencing them for crime,

150A and that without additional power given to Congress the General Government could not prevent such a result. (Globe, February 27, page 1056.)

Others urged the amendment on the same and similar grounds.

Mr. HALE, of New York, opposed the amendment. He said that under it—

"All State legislation, i.e. its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overriden, may be repealed, and abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution."—*Globe*, page 1063.

On the 28th of February my colleague [Mr. BINGHAM] made a very able and elaborate speech in defense of the amendment. He based its necessity on the fact that Congress had then no power to legislate for life, liberty, and property within the States. He affirmed, also, that the guarantees of the rights of property and person named in the fifth article of amendments to the Constitution were not limitations on the State governments, but only on Congress. To support this position he quoted the case of Barron ex. The Mayor and City Council of Baltimore, (7 Peters, page 247;) also, Lessee of Livingston ex. Moore, (7 Peters, page 251;) also, 3 Webster, page 171; and then said, (Globe, page 1090:)

"The question is simply whether you will give by this amendment, to the people of the United States, the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution."

150A In the course of Mr. BINGHAM'S speech Judge Hale, of New York, asked him—

"Whether, in his opinion, this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal."

"Mr. BINGHAM. I believe it does in regard to life, liberty, and property, as I have heretofore stated it, the right to real estate being dependent on the State law, except when granted by the United States.

"Mr. HALE. I desire to know if he means to imply that it extends to personal estate.

"Mr. BINGHAM. Undoubtedly it is true."

Mr. CONKLING, now a Senator from the State of New York, during the same debate said of this amendment:

"It was introduced several weeks ago, and considered in a committee of fifteen. At that time and always I felt constrained to withhold from it my support as one of the committee, and when the consent of the committee was given to its being reported I did not concur in the report."—*Globe*, page 1094.

Mr. HOTCHKISS, of New York, said:

"I understand the amendment, as now proposed by its terms, to authorize Congress to establish uni-

151A form laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power."

I have been thus particular in reviewing the history of this debate, in order to show the sentiment that then prevailed in this House in regard to one of the theories which we are asked to adopt in this debate.

151A Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. Mark the action of the House. After a debate of two weeks, the record of which covers more than one hundred and fifty columns of the Globe, and in which the proposed amendment was subjected to a most searching examination, it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee.

Mr. BINGHAM. The gentleman is mistaken. A motion was made to lay that amendment on the table. There were 41 votes in favor of the motion and 110 against it. I voted myself in favor of a postponement; but the measure was not recommitted, for I was a member of the committee and knew what it could do.

Mr. GARFIELD, of Ohio. My colleague is technically right in saying that the measure was postponed. Of course the majority did not allow it to be laid on the table on motion of a member of the opposite party, and the motion was voted down, as my colleague has said. But the consideration of the measure was postponed on motion of Mr. CONKLING, who had opposed it from the start, and it did in fact go back to the committee, and was never

151A again discussed in this House. What is more, it was never debated at all in the Senate, though it was introduced into that body by Mr. Fessenden the same day that Mr. BINGHAM introduced it into the House. The whole history of the case shows that it became perfectly evident, both to the members of the Senate and of the House, after the House debate, that the measure could not command a two-thirds vote of Congress, and for th : reason the proposition was virtually withdrawn. Its consideration was postponed February 28 by a vote of 110 to 37.

THE AMENDMENT AS ADOPTED.

More than a month passed after this postponement, or recommittal, without further action in either House. On the 30th April, 1866, the fourteenth amendment was introduced into the House, and the first section was precisely as it now stands in the Constitution, except that the first sentence of the present text was not in the draft. The new form of amendment was also debated at great length. The gentleman who reported it from the committee, the late Mr. Stevens, of Pennsylvania, said that it came far short of what he wished, but after full consideration, he believed it the most that could be obtained.

Mr. BINGHAM. My colleague will allow me to correct him again. The remark of Mr. Stevens had no relation whatever to that provision, none at all. That is all I have to say on that point now.

151A Mr. GARFIELD, of Ohio. My colleague can make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe. I will show my colleague that Mr. Stevens did speak specially of this very section.

The debate on this new proposition, which afterward became the fourteenth amendment, was opened by Mr. Stevens, May 8th, in a characteristic and powerful speech. He spoke of the difficulties which the joint committee on reconstruction had encountered, and of the long struggle they had had to reach any proposition on which the friends of the amendment could unite. He said:

"The proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. . . . .

"The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, and property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of

151A redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in the courts or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them, those States will all, I fear, keep up this discrimination and crush to death the hated freedmen."—*Stevens*, page 2459.

In the long debate which followed this section of the amendment was considered as equivalent to the first section of the civil rights bill, except that a new power was added in the clause which prohibited any State from depriving any person within its jurisdiction of the equal protection of the laws. The interpretation of this first section, as given by Mr. Stevens, was the one followed by almost every Republican who spoke on the measure. It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States to legislate unequally for the protection of life and property. On the 9th of May Mr. Eliot, of Massachusetts, said:

"I support the first section because the doctrine it declares is right, and if under the Constitution as it now stands Congress has not the power to prohibit State legislation discriminating against any classes of citizens or depriving any persons of life, liberty, and property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred."—*Page* 2511.

151A Mr. FARNSWORTH approved the amendment but said that the first section might as well be reduced to these words: "No State shall deny to any person within its jurisdiction the equal protection of the laws," for that was the only provision in it which was not already in the Constitution. (Page 2539.)

It is noticeable also that no member of the Republican party made any objection to this section on the grounds on which so many had opposed the former resolution of amendment; but many expressed their regret that the article was not sufficiently strong.

Mr. Shankling, of Kentucky, a Democrat, said:

"The first section of this proposed amendment to the Constitution is to strike down the reserved rights of the States and invest all the power in the Federal Government."—*Page* 2500.

Mr. Rogers, of New Jersey, a Democrat, took similar ground. (Page 2538.)

These are the only declarations I find in the House debates, either by Democrats or Republicans, indicating that this clause was regarded as placing the protection of the fundamental rights of life and property directly in the control of Congress; and these declarations of Shankling and Rogers were general and sweeping charges, not sustained even by specific statement.

I close this citation of speeches on the amendment by quoting the view taken of the scope and meaning of this first section by my

151A

colleague, [Mr. BINGHAM.] He said:

"This section gives power to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by unconstitutional acts of any State.

"Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws, or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."—*Page* 2542.

After a debate on this new proposition which lasted several days and evenings, the amendment passed the House May 10, 1866, by a vote of 128 ayes to 37 noes, not one Republican voting against it. It will not be denied, as a matter of history, that this form of amendment received many Republican votes that the first form to which I have referred could not have received. In the Senate there was but little debate on the first section and no change was made in it, except that, on the motion of Mr. Howard, of Michigan, these words were added at the beginning of the section:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

Other changes were made by the Senate in other sections of the amendment, and the whole, as amended, passed June 8, by a vote of 33 to 11.

151A

On the 13th of June the House passed the article, with the Senate amendments, by a vote of 120 to 32, every Republican present voting for it.

With this review of the history of the clause rejected and that adopted in our minds, I ask gentlemen to consider the difference between the two. Putting the fifth clause of the amendment first, and, to make the comparison closer, omitting the definition of citizenship, the section as adopted reads thus:

"The Congress shall have power to enforce, by appropriate legislation, the following provisions"—

To wit:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And this is the rejected clause:

"The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of

151A life, liberty, and property within the States. The first limited but did not oust the jurisdiction of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities.

* * *

152A

GUARANTEES OF LIFE, LIBERTY, AND PROPERTY.

The next clause of the section under debate declares:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

153A This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. This very provision is in the constitution of every State in the Union; but it was most wise and prudent to place it in the serene firmament of the national Constitution, high above all the storms and tempests that may rage in any State.

EQUAL PROTECTION OF THE LAWS.

153A Mr. Speaker, I come now to consider the last clause of this first section, which is, as I believe, the chief and most valuable addition made to the Constitution in the section. That clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This thought was never before in the Constitution, either in form or in substance. It was neither expressed in any words in the instrument, nor could it be implied from any provision. It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation. Taken in connection with the other clauses of this section, it restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions, like the air of heaven, covering all and resting upon all with equal weight. The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not "deny the

153A equal protection of the laws" implies that they shall afford equal protection.

Now, Mr. Speaker, to review briefly the ground traveled over: the changes wrought in the Constitution by the last three amendments in regard to the individual rights of citizens are these: that no person within the United States shall be made a slave; that no citizen shall be denied the right of suffrage because of his color or because he was once a slave; that no State, by its legislation or the enforcement thereof, shall abridge the privileges or immunities of citizens of the United States; that no State shall, without due process of law, disturb the life, liberty, or property of any person within its jurisdiction; and finally, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

* * *

153A BILL TO ENFORCE THE FOURTEENTH AMENDMENT.

The first section provides, in substance, that any person who, under color of any State law, ordinance, or custom, shall deprive any person of any rights, privileges, or immunities secured by the Constitution, the offender shall be liable to an action at law, or other proper proceeding, for redress in the several district or circuit courts of the United States. This is a wise and salutary provision, and plainly within the power of Congress.

APRIL 4, 1871

SENATE

SPEECH BY SEN. MORTON
IN SUPPORT OF THE BILL

* * *

252A But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people, numbering nearly one half in some of the States, are without legal remedy in the courts of the States.

* * *

APRIL 5, 1871

SPEECH BY REP. DAWES
IN SUPPORT OF THE BILL

475 Mr. DAWES. Mr. Speaker, I have from the beginning been an attentive listener to all this debate, unexampled in duration and exhaustive in its character, and I delay for a few minutes the close of this discussion with no vain presumption on my part that I can add at all to the weight of the argument or to the startling array of facts upon which this action

is based, but solely that I may take my full
475 share of the responsibility of this hour, not only as a member of the House called upon to vote on this measure, but as a member of the committee that has reported it; so that no silence of mine may be construed into indifference upon this occasion.

I do not rise, sir, to defend the text of this bill. I recognize in it faults which those who have the right to claim the honor of its authorship are quite as ready and willing as myself to remove by amendments. But I am here, as far as in me lies, to give my support, and some reasons for it, to the principle upon which this bill is founded. The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities. No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty, and pursuit of happiness of every citizen of this Republic. When, sir, by the adoption of the

Constitution in 1788 the American citizen for
475 the first time stood forth before the world, his relations to his Government were so peculiar, the rights which this Constitution had secured to him, the privileges under it which he was to enjoy, and the immunities which it clothed him with were so peculiar, that he stood before the world a wonder and a marvel among all the nations of the earth and all the subjects of other Governments in this world.

Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities thus secured to him, there were added from time to time, by amendments, others, and these were augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here.

* * *

476 **It is all these, Mr. Speaker, which are comprehended in the words "American citizen," and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are inserted, there is also power to**

476 guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement, giving no authority to the executive, the judicial, or the legislative department of the Government to see to it that the American citizen already enjoyed undisturbed and freely the rights of which it is his just pride to boast before all the subjects of all other nations upon the face of the earth.

Sir, can there be any doubt that there exists whatever power is necessary to secure these rights? I do not stop to define them, I do not stop to say how far they go and what they fall short of. Whatever they are, on this side of the House and on the other no man trifles with them. Every member of this House boasts of them. Every member of this House will stand upon his feet and say that he will do what in him lies to defend them and to secure every American citizen in their full enjoyment, or he will go down before a storm of public indignation wherever he lifts his head. So, sir, we need not stop to inquire what they are. Whatever they are, the question is whether this Constitution, after all, was so empty, consisting of words, nothing more, as merely to embody abstract principles without carrying with it by its own force the power by legislation, or by any other proper means, of securing and carrying out to their full extent the free, undisturbed enjoyment of each and every one of the rights, privileges, and immunities, what-

476 ever they may be and however broad they may be, which the Constitution itself secures, or professes at least to secure, to the American citizen.

* * *

476 So, sir, as well by the reason and nature of the thing as by the authority of the proper interpreters of the Constitution, as by the express authority of the instrument itself, if any one of these rights, privileges, or immunities, whatever they are, are insecure in this or any other time, has been or is likely to be invaded, impaired, or otherwise injured, there is lacking no authority whatever for the pursuit by Congress of the proper means of remedying the evil.

* * *

476 The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.

476 And, therefore, sir, can we take these offenders into that tribunal. If it be an offense at all, it is because . . is an infraction of the Constitution of the United States or some law thereof; and, sir, for all questions that thus arise no part of the Constitution is more clear of doubt than this, the second section of its third article:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Sir, I have said that if it is an infraction of anything, it is an infraction of the constitutional right that I am discussing; and for the infraction of that right the Constitution is clear; there can be no gainsaying or caviling, that in all cases that arise under this Constitution, and the laws and treaties, the courts of the United States are expressly constituted and clothed with the power and functions they exercise.

Then, sir, where is the ground for debate? I talk of nothing but constitutional guarantees; I do not claim myself to be able to comprehend their full measure and scope. As long as the American citizen shall live under this flag and expanding his pursuits in his honest endeavors, so long his constitutional guarantees will expand and grow with him, and be equal to and cover every lawful enterprise and undertaking of his within the limits of this Republic; and no man can define them upon paper until they come up.

476 Whatever they be, he, sir, who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers, sir, all there is in the first and second sections of this bill.

SPEECH BY REP. WILSON
IN SUPPORT OF THE BILL

* * *

482 By the fifth section of the fourteenth article Congress has power to enforce the provisions of the article by appropriate legislation. Now, I ask, what legislation could be more appropriate than to give to a person injured by another under color of such unconstitutional State laws a remedy by civil action? What provision of the Constitution is violated thereby? It will be sought for in vain. Gentlemen are forced to concede that there are certain rights, privileges, and immunities inhering in the citizen by virtue of the Constitution. These rights, privileges, and immunities Congress may enforce by legislation; and it is proposed to enforce them by this bill, by the mild remedy of a civil action; and that is all there is of it.

Now, sir, what is the second section of this bill? It is simply this. It makes it a penal offense for two or more persons to conspire together to do any act of the character set forth

482 in the section in violation of the rights, privileges, and immunities of any person to which he is entitled under the Constitution and laws of the United States. The Constitution and laws were made to define and protect the rights of citizens. Can it be that Congress has no power to prevent conspiracies against the Constitution or against the laws of its own enacting? Such a proposition will not bear argument since the adoption of the fourteenth article of amendments.

But I apprehend that it is not against these sections of this bill that these objections are more especially aimed, but that the third and fourth sections are more especially obnoxious to gentlemen of the Opposition.

* * *

482 But the language is "no State shall deny." What is meant by the word "State?" Obviously the word is used in its largest and most comprehensive sense. It means the government of the State. What is a State in its true sense? It is a government, not a mere legislative body empowered to enact laws; it is a trinity: the legislative, the judicial, and the executive; these three are one, the State. It requires the combination and coöperation of these three coördinate branches to make the State government; and when the word "State" is used in this article it is in this triune sense, and its constitutional provision means that this trinity shall not deny, &c. Now, if the legislative branch enacts and the judicial and executive fail or refuse to perform their respective

482 parts, does not the State "deny?" If the Legislature provides penalties, and the judiciary refuses to adjudge them or is unable to do so, has not the State denied to the citizen who is the victim of the violation of the legislative act the equal protection of the laws?

A refusal to legislate equally for the protection of all would unquestionably be a denial. This conceded, upon what ground can it be pretended that a refusal to execute, or a failure to do so, through inabilily, equally with reference to all persons, is not also a denial? I maintain, therefore, that the true meaning of this constitutional provision is that the State shall afford equal protection to all persons within its jurisdiction.

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APRIL 6, 1871
SENATE

SPEECH BY SEN. FRELINGHUYSEN
IN SUPPORT OF THE BILL

501 Mr. FRELINGHUYSEN. I will leave my friend from Missouri to discuss that question with the Senators from Rhode Island. It is a little off the line of remark to which I was directing the attention of the Senate.

The General Government should not derogate from the power and authority of the States, but should act in their aid. The Constitution already declares that, when called upon, it is the duty of the President to aid and strengthen the States. But still the perplexing practical question recurs, how, in what manner, is the General Government to protect the privileges of its citizens?

There are three classes of remedies that might be applied: civil remedies, criminal remedies, and public or national relief.

As to the civil remedies, for a violation of these privileges, we know that when the courts of a State violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he

501 could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.

* * *

502 The United States thus interfering only when the State will not or cannot protect the privileges and immunities of citizens of the United States, it would be an absurdity to say that when the rights of citizens are willfully violated by the authorities of a State the Federal Government should delay to interfere until requested to do so by the State. The United States interferes only to guaranty rights and protection when the State fails, and acts in its national character, and not municipally. It does not interfere with the State government, excepting to strengthen and sustain it. The United States neither makes nor executes a criminal code. The framework of our Government, reserving municipal government to the States and national jurisdiction to the General Government, is not disturbed. If any one thinks it is going too far to give the United States this national supervisory power to protect the fundamental rights of citizens of the United States, I do not agree with him. It is not wise to permit our devotion to the reserved rights of the States to be carried so far as to deprive the citizen of his privileges and immunities.

502 We must remember that it was State rights, perverted I admit from their true significance, that arrayed themselves against the nation and threatened its existence. We must remember that it was for the very purpose of placing in the General Government a check upon this arrogance of some of the States that the fourteenth amendment was adopted by the people. We must remember that, if the legislation we propose does trench upon what have been, before the fourteenth amendment, considered the rights of the States, it is in behalf and for the protection of immunities and privileges clearly given by the Constitution; and that Federal laws and Federal rights must be protected whether domestic laws or their administration are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land. We are not making a constitution, we are enacting a law, and its virtue can be tested without peril by the experiment. Placing the discretion as to the enforcement of the law with the President, and not with the Governor of a State or with a marshal, I see no peril.

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HOUSE OF REPRESENTATIVES

SPEECH BY REP. BURCHARD
IN SUPPORT OF SECTION 1 OF THE BILL
AND PROPOSING AMENDMENTS TO
SECTION 2

* * *

314A As in the first section of the fourteenth amendment all the prohibitions are upon States, let us inquire

WHAT IS HERE MEANT BY A STATE?

The Constitution recognized existing and future subordinate political governments called States. Every citizen of the United States is a citizen of the State wherein he resides. He sustains relations to the General Government directly as an individual, and indirectly as a citizen of a State. A duty enjoined upon a State evidently can only be performed by and through its people, but a State implies the whole body of the people, organized for political purposes under a government to which powers have been delegated to act for and in the name of the whole. Thus organized, the people compose the State and act, not individually, but in their collective capacity, through agents, either by ordinances through delegated conventions, or through legislative, executive, or judicial officers, acting under a State constitution and laws for the State in the discharge of official duties and functions.

In the enforcement of the observance of duties imposed directly upon the people by the Constitution, the General Government applies

314A the law directly to persons and individual acts. It may punish individuals for interference with its prerogatives and infractions of the rights it is authorized to protect. For the neglect or refusal of a State to perform a constitutional duty, the remedies and power of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State. If a State fails to appoint presidential electors, or its Legislature to choose Senators, or its people to elect Representatives, Congress cannot act for them. Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require State officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?

The Federal courts have repeatedly held that they could require municipal and county offi-

314A cers to perform the duties imposed upon them by State laws in levying taxes, when such tax became necessary to collect a judgment in their courts against such city or county, although all the power and authority of such officers was derived from State laws. It can issue its mandates to such officers and enforce obedience by penalties and imprisonment. Cannot Congress provide to punish conspiracies to prevent the performance of duties it can compel such officers to discharge? Can it not, then, go as far in requiring State or county officers to perform those official duties, or at least those ministerial acts which protect a citizen in the enjoyment of his consitutional rights, as it can in compelling the discharge of those which merely secure the enforcement of a legal obligation? Is the power greater when official duty concerns property than when it concerns life and person? If the Federal Government can compel State officers to act under State laws in the collection of a money bond, can it not insist upon their performance of duties imposed by

315A the Constitution upon State officers by means of which equal protection is secured for life and person? The next clause is:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Is the power to punish individual crimes conferred upon the General Government by this clause? The deprivation must be the action of the State through its officers representing the State. The prohibition was unnecessary as to private persons. No person

315A had or has the right, except in necessary self-defense or under governmental sanction, to deprive another of life, liberty, or property. This limitation is upon the State, as the similar prior limitation in the Constitution was upon the national authority. Neither the national nor the State governments can now deprive a person of life, liberty, or property without due process of law. This clause does not relate to the lawless acts of private individuals depriving persons of life, liberty, or property. Such acts are no more the action of the State than of the United States.

* * *

APRIL 11, 1871

SPEECH BY SEN. EDMUNDS
IN SUPPORT OF THE BILL

* * *

568 Having said this about these amendments, and having stated, I believe, that the committee regard almost all of them as essential to the perfectness and proper and easy operation of the statute, I will now, while I am up, say a word in respect to the scope of the bill as it stands and as it will be, as to its general scope if amended.

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely car-

568 rying out the principles of the civil rights bill, which have since become a part of the Constitution.

The second section, it will be observed, only provides for the punishment of a conspiracy.

* * *

569 Mr. THURMAN. Will the Senator from Mississippi allow me, before he proceeds, to ask one question of the Senator from Vermont?

Mr. AMES. Certainly.

Mr. EDMUNDS. I will answer any question.

Mr. THURMAN. I am told—I did not hear it myself—that the Senator said nobody was opposed to the first section of the bill, and that was understood here as meaning nobody of the Judiciary Committee.

Mr. EDMUNDS. I did not quite say that. I intended to say, as this was so very simple and really reënacting the Constitution, that I supposed nobody would be opposed to it. I did not undertake to say, because I should have had no right as matter of etiquette or any other right to say, what any member of the committee thought about it.

Mr. THURMAN. I do not complain of that. I do not think there would be any want of propriety in saying that the committee were unanimous in favor of any section of the bill. I do not think there would be any impropriety in so stating if that were the fact.

Mr. EDMUNDS. I did not undertake to say that.

569 Mr. THURMAN. If it was understood in that way, I wish to say that, for reasons which I shall state at the proper time, I am opposed to the first as well as the other sections of the bill.

COLLOQUY AMONG SENATORS
TRUMBULL, CARPENTER, AND EDMUNDS

SEN. TRUMBULL

* * *

577 The difference between the Senator from Wisconsin and myself is, as to what are the privileges and immunities of citizens of the United States. I insist that the privileges and immunities belonging to the citizen of the United States as such are of a national character, and such as the nation is bound to protect, whether the citizen be in foreign lands, or in any of the States of the Union. The Government of the United States protects the citizen of the United States to the same extent in Carolina or Massachusetts as it protects him in Portugal or in England. National citizenship is one thing, and State citizenship another; and before this contitutional amendment was adopted the same obligation, in my judgment, rested upon the Government of the United States to protect citizens of the United States as now.

The next clause of the fourteenth amendment is this:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law."

577 That was the Constitution applicable to the Government of the United States before the adoption of the late amendments. The Federal Government had no authority under the Constitution as it was amended, in 1791 I think, to deprive any person of life, liberty, or property without due process of law. That inhibition did not extend to the States, but all the States had adopted a similar clause in their State constitutions. Every one of them, as far as I have examined, had done so; but there was no clause in the Constitution of the United States binding them to carry out this provision. There is no change in that respect so far as the States are concerned, and the Federal Government cannot interfere with the States so long as they do not deprive some person of life, liberty, or property without due process of law. If they should, then the power is given to the Federal Government to correct that violation of the Constitution of the United States. It may now prevent any State from depriving any person of life, liberty, or property without due process of law. I am not now speaking of the machinery for doing it; but the power is now in the Federal Government under the fourteenth amendment to prevent a State doing what no State would undertake to do without a violation of its own constitution.

Then follows the other clause:

"Nor deny to any person within its jurisdiction the equal protection of the laws."

That is a new provision, and the Federal

577 Government is now vested with power to see to it that no State deprives any person of life, liberty, or property without due process of law, or denies to any person within its jurisdiction the equal protection of the laws; just as, under the old Constitution, no State could pass a law impairing the obligation of contracts. The Federal Government was vested with power to see that no State did pass a law impairing the obligation of contracts. But suppose a State did do it? Suppose a State passed an *ex post facto* law or a law impairing the obligation of contracts? That act was void, and it was the duty of the State courts to pronounce it void, which, in some instances, they did. But suppose the State courts upheld this void act of the State Legislature, which impaired the obligation of contracts; what then? The Federal Government interfered and declared the law invalid and afforded to the party the means to enforce his contract as it had been made.

Now, suppose in the cases arising under the fourteenth amendment that a State attempts to deprive a person of life, liberty, or property without due process of law, or suppose that a State denies to a person within its jurisdiction the equal protection of the laws, then the Federal Government has a right to set aside this action of the State authorities and see to it that the person is protected in his life and his liberty and his property, unless they are taken from him by due process of law, and that he receives the equal protection of the laws, just as it furnished the means to give

577 him the enforcement of his contract under the old Constitution.

Mr. CARPENTER. Will my friend allow me a question at that point?

Mr. TRUMBULL. Certainly.

Mr. CARPENTER. The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by such a State law, and that was brought before the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.

I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.

577 Mr. TRUMBULL. Mr. President, I am not specially upon the question of remedies at this moment, as to how the United States should afford the remedy; but let me say to the Senator from Wisconsin that the authority of the United States was just as positive under the Constitution, as originally framed, as it is under the fourteenth amendment. What says the Constitution of the United States? It says—this is the original Constitution:

"No State shall pass any *ex post facto* law, or law impairing the obligation of contracts."

That is what the Constitution said. What else did it say?

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

578 What was vested in the Government of the United States? The power to carry out the clause declaring that no State should pass a law impairing the obligation of contracts. This was a power conceded by the people to the Government of the United States when they made it, and with that concession went along the power to make all laws necessary and proper to carry it into effect.

Mr. CARPENTER. Will my friend allow me one other remark at that point, which, I think, will end my interruptions?

Mr. TRUMBULL. Certainly.

Mr. CARPENTER. As I now understand his construction of the old Constitution, the

578 authority conferred on Congress to pass laws to execute the powers conferred on the Government included the power to pass laws which should prevent the States from doing the things which they were prohibited from doing by the Constitution. With that admission, I do not think the fourteenth article, or any article, could add anything to the old Constitution. But I never heard of that construction before; and while I am not ready to make an affidavit that it is sound, it is satisfactory for all the purposes of this bill.

Mr. TRUMBULL. Mr. President, as I have once or twice said to the Senator from Wisconsin, I am not upon the remedies. The Government of the United States did provide in 1789, by a law, to give effect to that very clause of the Constitution, and the Senator knows it.

* * *

578 Mr. EDMUNDS. Suppose they fail?

Mr. TRUMBULL. If they fail by reason of organized opposition, resort, as in the case I supposed, and to which the Senator from Vermont agreed, is had to force, if necessary, in order to give the protection.

I come now, Mr. President, to the bill under consideration about which I shall make a few suggestions, and but few. I wish to premise at the outset that I am going into no statement about the outrages in the South. Whether they have been exaggerated, as some contend, or whether they are as bad as others insist, is not a question that I propose at all to discuss.

578 The President of the United States has thought it questionable at any rate whether he had sufficient power to put down organizations which exist in some of the States of the Union, which are encroaching on the rights of person and property, which are committing outrages and sacrificing life. Now, sir, I want it understood that I am ready to go as far as he who goes farthest to maintain the authority of the Government of the United States.

Show me that it is necessary to exercise any power belonging to the Government of the United States in order to maintain its authority and I am ready to put it forth. But, sir, I am not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another. We, in my judgment, have no constitutional authority to do that. When this Government was formed, the general rights of person and property were left to be protected by the States, and there they are left to-day. Whenever the rights that are conferred by the Constitution of the United States on the Federal Government are infringed upon by the States, we should afford a remedy. That was done in 1789 by the twenty-fifth section of the judiciary act, which afforded a remedy against a State statute in violation of the Constitution of the United States, as in the case of a State law impairing the obligation of contracts. I have no objection now to a law which shall protect a person in the same

579 way against inequality of legislation in any of the States of the Union against any law that deprive him of life, liberty, or property except by the judgment of his peers or the law of the land. I am ready to pass appropriate legislation on that subject; and I understand that this bill as it passed the House of Representatives was framed on this principle. As originally introduced, it went to the extent of punishing offenses against the States; and there was objection to it on the part of some of the most thoughtful minds in the House of Representatives. Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State.

To that extent I felt that I could give my support to the bill. I regretted that the Committee on the Judiciary thought it necessary to amend the bill; but a majority came to that conclusion, and I think (although I believe in that the Senator from Vermont who reports the bill with the amendments does not agree with me) that these amendments make the bill obnoxious to the very objection which was made to it in the House of Representatives in its

original shape, that it does go to the extent of undertaking to punish persons for violating State laws, without reference to any violation of the Constitution or laws of the United States.

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APRIL 13, 1871

SPEECH BY SEN. SUMNER
IN SUPPORT OF THE BILL

Mr. SUMNER. Mr. President, the questions presented in this debate have been of fact and of constitutional law. It is insisted on one side that a condition of things exists in certain States affecting life, liberty, property, and the enjoyment of Equal Rights, which can be corrected only by the national arm. On the other side this statement is controverted, and it is argued also that such intervention is inconsistent with the Constitution of the United States. On both questions, whether of fact or law, I cannot hesitate. To my mind, outrages are proved, fearful in character; nor can I doubt the power under the Constitution to apply the remedy.

The evidence is cumulative. Ruffians in paint and in disguise seize the innocent, insult them, rob them, murder them. Communities are kept under this terrible shadow. And this terror falls especially upon those who have stood by the Union in its bloody trial and those others of different color who have just been admitted to the blessings of freedom. To both of these classes is our nation bound

by every obligation of public faith. We cannot see them sacrificed without apostacy. If the power to protect them fails then is the national Constitution a failure.

I do not set forth the evidence, for this has been amply done by others, and to repeat it would be only to occupy time and to darken the hour. The report of the committee at least as regards one State, the testimony of the public press, the stories of violence with which the air is laden and private letters with their painful narrations—all these unite, leaving no doubt as to the harrowing condition of things in certain States, lately in rebellion; not the same in all these States or in all parts of a State, but such as to show in many States the social fabric menaced, disturbed, imperiled in its very foundations, while life, liberty, property, and the enjoyment of equal rights are without that security which is the first condition of civilization. This is the case simply stated. If such things can be without a remedy applied if need be by the national arm, then are we little more than a bundle of sticks, but not a nation. Believing that we are a nation, I cannot doubt the power and the duty of the national Government. Thus on general grounds do I approach the true conclusion.

So long as Slavery endured a State was allowed to play the turtle, and, sheltered within its shell, to escape the application of those master principles which are truly national. The Declaration of Independence with its immortal truths was in abeyance; the Constitution itself was interpreted always in support of Slavery.

651 I never doubted that this interpretation was wrong, not even in the days of Slavery; but it is doubly, triply wrong, now that the Declaration of Independence is at last regarded, and that the Constitution not only makes Slavery impossible but assures the citizen in the enjoyment of Equal Rights. I do not quote these texts, whether of the Declaration or the Constitution. You know them by heart. But they are not vain words. Vital in themselves, they are armed with all needful powers to carry them into execution. As in other days Slavery gave its character to the Constitution, filling it with its own denial of Equal Rights, and compelling the National Government to be its instrument, so now do I insist that Liberty must give its character to the Constitution, filling it with life-giving presence and compelling the National Government to be its instrument. Once the Nation served Slavery and in this service ministered to State Rights; now it must serve Liberty with kindred devotion, even to the denial of State Rights. All this I insist is plain according to rules of interpretation, simple and commanding.

In other days, while the sinister influence prevailed, the States were surrounded by a Chinese wall so broad that horsemen and chariots could travel upon it abreast; but that wall has now been beaten down, and the citizen everywhere is under the protection of the same Equal Laws, not only without distinction of color but also without distinction of State.

What makes us a Nation? Not armies, not fleets, not fortifications, not commerce reaching every shore abroad, not industry filling

651 every vein at home, nor population thronging the highways; none of these make our Nation. The national life of this Republic is found in the principle of Unity and in the Equal Rights of all our people; all of which being national in character are necessarily placed under the great safeguard of the Nation. Let the national unity be assailed, and the nation will spring to its defense. Let the humblest citizen in the remotest village be assailed in the enjoyment of Equal Rights, and the Nation must do for that humblest citizen what it would do for itself. And this is only according to the original promises of the Declaration of Independence, and the more recent promises of the constitutional amendments, the two concurring in the same national principles.

Do you question the binding character of the great Declaration? Then do I invoke the constitutional amendments. But you cannot turn from either, and each establishes beyond question the boundaries of national power, making it coextensive with the national unity and the Equal Rights of all originally declared and subsequently assured. Whatever is announced in the Declaration is essentially national, and so also is all that is assured. The principles of the Declaration, reënforced by the constitutional amendments, cannot be allowed to suffer. Being common to all, they must be under the safeguard of all; nor can any State set up its local system against the universal law. Equality implies universality; and what is universal must be national. If each State is left to determine the protection of Equal Rights, then will protection vary

651 according to the State, and Equal Rights will prevail only according to the accident of local law. There will be as many equalities as States. Therefore, in obedience to reason, as well as solemn mandate, is this power in the Nation.

Nor am I deterred from this conclusion by any cry of centralism, or it may be of imperialism. These are terms borrowed from France, where this abuse has become a tyranny, subjecting the most distant communities even in the details of administration to central control. Mark, if you please, the distinction. But no such tyranny is proposed among us; nor any interference of any kind with matters local in character. The Nation will not enter the State, except for the safe-guard of rights national in character, and then only as the sunshine, with beneficent power, and, like the sunshine, for the equal good of all. As well assail the sun because it is central—because it is imperial. Here is a just centralism; here is a generous imperialism. Shunning with patriotic care that injurious centralism and that fatal imperialism, which have been the Nemesis of France, I hail that other centralism which supplies an equal protection to every citizen, and that other imperialism which makes Equal Rights the supreme law, to be maintained by the national arm in all parts of the land. Centralism! Imperialism! Give me the centralism of Liberty. Give me the imperialism of Equal Rights. And may this national Capitol, where we are now assembled, be the emblem of our Nation.

651 Planted on a hill-top, with portals opening North and South, East and West, with spacious chambers and with arching dome crowned by the image of Liberty; such is our imperial Republic; but in nothing is it so truly imperial as in that beneficent Sovereignty which rises like a dome crowned by the image of Liberty.

Nor am I deterred by any party cry. The Republican party must do its work, which is nothing less than the regeneration of the Nation according to the promises of the Declaration of Independence. To maintain the Republic in its unity, and the people in their rights, such is this trauscendent duty. Nor do I fear any political party which assails these sacred promises, even if it falsely assume the name of Democrat. How powerless their efforts against these immortal principles! For myself I know no better service than that which I now announce. Here have I labored steadfastly from early life, bearing obloquy and enmity, and here again I pledge the energies which remain to me, even if obloquy and enmity survive.

SPEECH BY SEN. OSBORN IN SUPPORT OF THE BILL

653 Mr. OSBORN. I move to amend the sixth section of the bill by striking out all after the word "crime," in the thirteenth line, in the following words:

And the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June 17, 1862, be, and the same is hereby, repealed.

653 That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.

The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts. The report of the committee shows that every man who takes the oath of the order known as the Ku Klux Klan and becomes obedient to its rules is bound to perjure himself to protect the members of the order, no matter how great the crime for which they may be presented to a grand jury or for which they may be upon

653 trial. All the testimony laid before us by the committee bearing upon this point proves conclusively that this is the interpretation given to this oath by those who take it and that this is the practice under it.

The State courts, mainly under the influence of this oath, are utterly powerless then. What shall we do to maintain order and to punish the guilty in a community where a large proportion of the people are bound together by oaths and obligations, having pass-words, signs of recognition, and whose well-defined and clearly-proven object is to gain political control by intimidation and murder, solemnly obligated to clear the guilty or condemn the innocent, according as the one may be a broher in crime and the other a political opponent? What can we do when such men are allowed to crowd each other forward upon juries and upon the witness-stand, with no purpose or object but to swear to truth or falsehood, to condemn or to acquit as may best advance the interests of their order? Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice.

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SPEECH BY SEN. VICKERS
IN OPPOSITION TO THE BILL

* * *

661 I understand that this bill is alleged to be predicated upon the principle that the States are unable to protect life, liberty, or property, and being unable, the powers of the General Government are invoked to do it. What evidence have we that a State is unable to fulfill her duties to her citizens? How are we to know that? What is a State? Is it not a body politic and corporate? I give Mr. Webster's definition of a State in the Rhode Island case, which he argued so ably:

"The people cannot act daily as the people. They must establish a government, and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called 'The State.' I like the old-fashioned way of stating things as they are, and this is the true idea of a State. It is an organized government, representing the collected will of the people, as far as they see fit to invest that government with power."

That is the definition by a great statesman. It is an organized government representing the collective will of the people. A State can act, how? Only through its departments. A State can act only through its legislative department when laws are involved. How, then, can it be that a State fails to do its duty to its own citizens because it has passed no law? Who is interested in preserving order and tranquillity in a State? Is it not the government of the State? Is it not the people of the State? They have laws to punish all offenses; and there is no want of law, it is admitted, but it is said the States do not execute the laws. Who suffers by that? The citizens of the State, in

661 their persons and their property. Can any other government, for instance the Government of the United States, which is nothing more than a body politic and corporate, say that the State government does not perform its duty to its own citizens, its own people, that it does not protect their property, their persons, their lives, or their interest. How can that be said of a State?

If that could be the case there would be continual conflict between the General and the State Governments. If we once depart from the authority given to the General Government by the Constitution as explained and enforced in the Federalist, then that Government will be in constant conflict with the States. If it can enter a State for one purpose it can for any other purpose. It has no semblance of authority to do it. This fourteenth amendment does not enlarge the powers of the General Government in that respect. It prohibits a State from denying "to any person within its jurisdiction the equal protection of the laws." Has any State done that? Who is to judge whether a State performs its duty to its own citizens? Because, it will be remembered that before the Constitution of the United States was formed they were citizens of the States, they owed their allegiance to the State governments, which had laws to protect them, and officers to execute those laws. When the General Government was formed the States did not surrender any of their police powers, any of those powers to protect the life or the property of their people. They retained them all. The Federalist says that the courts of the States retained all the powers and the jurisdiction which they had before the adoption of the Constitution; and further, when the General Government, by its acts, created new causes or

661 offenses, unless the State courts were prohibited, they would have a right to exercise jurisdiction over those causes; so that the powers of the courts of the States were enlarged, not diminished, by the creation of the Federal Government. The latter does not own a foot of territory in a State unless purchased, and they cannot exercise jurisdiction over purchased property without the consent of the State. The objects of the General Government are external and not internal, and when a provision like this was violated by any State by such denial of the equal rights of the [sic] by State enactment the Supreme Court would have jurisdiction to pronounce such law unconstitutional. Such is the remedy, and not bayonets and suspension of the writ of *habeas corpus*. Congress cannot declare the status which any person shall sustain while in any State of the Union. The power can be exercised over persons as passengers only while on the ocean and until they come under State jurisdiction. It commences when the voyage ends, and then the State laws controls. [sic] (Paschal 105, ref. Tennessee People; 26 Barb. 270.)

Mr. Madison says, in No. 82 of the Federalist:

"I mean not, therefore, to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the Federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national Legislature, they will, of course, take cognizance of the causes to which those acts may give birth."

661 Now, is it to be presumed by any one that a State does not perform its duty--a sovereign State? Who is to raise the presumption? How is it to be drawn? If a State passes a limitation law, which limits a period for the collection of debts, the State is not bound by its own law, but it binds all the citizens of the State and all who come within its jurisdiction; but it does not affect the claim of the States. *Nullum tempus occurrit regi*--no time affects the king; no time bars the State. It is not bound by its own laws, unless it be named in the statute. No presumption can arise by lapse of time on the claim of a State against an individual that it has been paid, or that the State has been guilty of laches in the prosecution of it. Why? Because it is a sovereign State. It makes rules and regulations, not for itself, unless named, but for those who are subject to its jurisdiction. What have we here? We have the extraordinary attitude assumed by this bill that the State fails in her duty to her people. They presume she fails when the General Government steps in gratuitously and claims the right to act for and in the place of the State in her internal affairs.

I promised to speak but thirty minutes, and I will give way to the Senator from Missouri in a moment.

The fourth section of the bill is:

That whenever in any State, or part of a State, the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able by violence to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or
662 when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of

662 either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such districts impracticable, in every such case such combinations shall be deemed a rebellion against the Government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of *habeas corpus*, to the end that such rebellion may be overthrown.

Was ever such a thing heard of before? What! That a State, a sovereign State, bound by its constitution and its laws to protect the people of the State, shall absolutely be in com-

662 plicity with the people of its own State, its own citizens, in an infraction of the laws, in a combination to defeat its own laws and to prevent their execution. How absurd and preposterous. Did ever such an idea before enter into the head of any one, that a State could be in complicity with its insubordinate, refractory, and lawless members to defeat its own laws, to disturb its tranquillity, and to promote disorders, violence, and outrage within its own border? The very primary duty of the State is to preserve order and protect its people, and how can such a presumption be raised, and against her, who is to judge of that presumption? Is it Congress? Is it the President of the United States? How is he to get his information? From spies and from informers. How is he to procure it? A State can only act through its organization; it is a body corporate and politic, and can act officially only by its Legislature or Executive.

By the fifth amendment of the Constitution the Federal Government is prevented from depriving a citizen of the United States of life, liberty, or property, without due process of law. This means, of course, process in the courts of the United States, for the provision has no reference to the States or their courts. But how can the General Government deprive the citizen of the rights mentioned? Could it be done by any single department, or by any agent of the Government, or by any number of disguised persons in the District of Columbia? If the President attempted it it would not be the act of the Government. It would

662 require an act of Congress, a law, to justify the allegation that the Federal Government had deprived the citizen of his personal rights and right to property. Could any neglect or omission of the Government raise a presumption against it that it had failed to perform its duty and violated the great fundamental law of the land in this respect, to justify the military interference of others? How unjust and factious is it to lay hold on the conduct of a few disguised men who commit wrong and avoid detection to assume that a State has violated her constitution, and upon that assumption to enter her territory with armed soldiers and the suspension of the *habeas corpus;* assuming further that a state of war exists within her borders, subjecting every one to military trial and punishment. She has passed no law, taken no step toward the privation of any right of the citizen.

The first section of the fourteenth amendment declares that—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Legislation by the State is expressly referred to, and no State has the power or the capacity to deny the rights referred to, except by legislation; and the meaning is so plain that a subterfuge is scarcely left to the supporters of the bill in the form and shadow of a failure to convict all offenders.

* * *

SPEECH BY SEN. THURMAN
IN OPPOSITION TO THE BILL

216A Mr. THURMAN. This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States. I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such causes into the Federal courts.

My objections to this section are briefly these: I object to it, first, because of the cen-

216A tralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of.

In the next place, I object to it because it is really, whatever may be said about it, a disparagement of the State courts. This bill embraces the whole United States; and to say that every man who may be injured, however slightly, in his rights, privileges, or immunities as a citizen of the United States can go to the Federal courts for redress is to say, in effect, that the judiciary of the States is not worthy of being trusted. I for one am unwilling to say that. I certainly am unwilling to say it in regard to my own State. Although the judges of the highest court in Ohio are all politically opposed to me, and although a large majority of the judges of the inferior courts are in the same manner opposed to me in political sentiment, I stand here this day to affirm that they will give fair and impartial redress to any man whose rights under the Constitution have been violated by any one whomsoever. I am unwilling to say to the people of Ohio that the Congress of the United States thinks their judiciary

216A so unsafe or so unworthy of trust that the people must seek for redress in the courts of the United States.

In the next place, I am opposed to this transfer of jurisdiction to the Federal courts because of the expense and the inconvenience that must attend it. In most of the States the Federal courts are held in not more than two places; there are very few in which they are held in as many as three places. Let an action be brought, therefore, in the Federal court, it may be but for five dollars, and the defendant may be dragged hundreds of miles, at great expense, to attend to the defense of the suit, and not he only, but also the witnesses who may be necessary to make out his defense.

For these reasons it does seem to me that this grant of jurisdiction to the Federal courts to entertain these actions, without any limit whatsoever as to the amount in controversy, is impolitic and unwise.

My next objection to the section is its vagueness; and now I pray the attention of the Senate to that. It provides—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law.

"Any person" who is deprived "of any rights, privileges, or immunities secured by the Constitution of the United States." What

216A is meant by that? What are the rights, privileges, and immunities that, in the opinion of your committee, are secured by the Constitution of the United States? I take it that if that is to be left to judicial decisions, as it is here entirely, without any definition on our part, there may be almost as many decisions as there are judges of the Federal courts; and it will be a long time before the questions that would arise under this section would reach the Supreme Court of the United States and there be definitely settled.

Are Senators on this floor all of the same mind as to what are the rights, privileges, and immunities of citizens or of persons secured by the Constitution of the United States? What is the opinion of the elder Senator from Massachusetts [Mr. SUMNER] as shown by his supplementary civil rights bill, which he has pressed with so much earnestness upon the attention of the Senate? If I understand the scope of that bill, he holds it to be one of the rights, privileges, and immunities of a citizen of the United States that, without regard to color, he shall occupy in the hotels, in the public theaters, in the concert-rooms, in the churches, and in the schools of the country the most absolute

217A social equality with everybody else; and, therefore, if any school directors should provide schools for the colored children separate from the whites and not allow them to mix together, that would be, in his opinion, a deprivation of the right of the colored child. If any hotelkeeper should set apart a particular table for

217A the colored people who should be his guests, instead of allowing them to sit at the table frequented by the whites, that, in the opinion of the Senator, would be an indignity offered to them, a violation of the rights, privileges, and immunities. If they are not allowed to mix with the guests of the Arlington at the first table of that hotel, or if they are not allowed to take their seats indiscriminately with the whites at the Academy of Music or the Opera House in New York, that, as he thinks, is a deprivation of their rights, privileges, and immunities as citizens of the United States.

If he is right in all this—and there are other Senators here who concur with him—then every hotel-keeper, every steamboat man, every keeper of a place of public amusement, every school director, may be liable under this bill because he does not give to the colored people the absolute social equality of mixing indiscriminately with the whites at places of public amusement, or in the hotels, or on the steamboats, or in the schools. Every railroad company, if it sets apart a particular car for colored people, though it may be as good a car as any in the train, is, upon this interpretation of the Constitution, liable to an action in the Federal courts under this bill, should it become a law.

Now, it does seem to me that in view of these illustrations—and they are but a few out of many that might be given—in view of the great question, what are the rights, privileges, and immunities secured by the Constitution of the United States? when we undertake to con-

217A fer such a jurisdiction as this on the Federal courts we ought to define what rights, what privileges, what immunities, in our opinion, are thus secured and call for protection in those courts.

But again, I have another objection to this section. Have Senators noticed how comprehensive its language is? It refers to a deprivation under color of law, either statute law or "custom or usage" which has become common law. It provides—

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, &c., shall be liable to an action.

Now, I put it to the member of the committee who has this bill in charge, does that include the legislators of a State? And when he comes to address the Senate I hope he will tell us what his interpretation is. It is a deprivation under color of law, a deprivation which some one shall inflict or cause to be inflicted upon some other; and now if the legislators of a State pass a law which, in the judgment of some person, deprives him of some right, privilege, or immunity, and a district judge of the United States should be of the same opinion, I put it to the Senator, where is the clause that exempts those legislators from the action that is provided in this section of the bill? I do not know what answer can be given to this. They pass the law, and they are therefore the very persons who do cause the man

217A to be deprived of what is held to be his privilege.

Suppose, for instance, the State of Ohio, as has usually been the case there, provides for schools for white children separate from schools for colored children; for the State of Ohio has educated colored children almost ever since it had a school system, but in general has provided for their schools being kept separate from the schools for the white children. If that is the deprivation of a right, privilege, or immunity, then by the terms of this bill, unlimited as they are, every legislator who votes for such a law is liable to be sued in a district court of the United States, and that although he voted for the law under the obligations of his oath to support the Constitution of the United States, and in strict accordance with what he conscientiously believed to be the true meaning of that instrument.

Let us go a little further. Let us apply it to ourselves. There is no law in this country that exempts members of Congress from responsibility any more than members of State Legislatures. The Constitution provides that we shall not be liable to answer anywhere else for what we may say in debate upon this floor, but for our acts we are just as liable as members of State Legislatures, for they have the same exemption. Suppose a majority of Congress shall pass a bill which in the judgment of some district judge of the United States shall have the effect to deprive an individual of some right, privilege, or immunity secured to him by the Constitution of the United States.

217A It may be said that that does not apply, because the law that is here spoken of is the law of a State, but in principle it would apply, and if a legislator of a State ought to be sued because he voted for a law which he conscientiously under his oath believed to be constitutional, you should carry out the principle and subject a Senator in Congress to exactly the same liability. Need I say that such a liability would be utterly destructive of the freedom of thought and action that are indispensable to the proper discharge of legislative duties?

But let us go a little further. What is to be the case of a judge? The Legislature of a State passes a law. It goes before a judge of the State court for interpretation. Under the oath which he has taken to support the Constitution of the United States and the constitution of his State he conscientiously renders a decision which another man, a judge of the district court of the United States, may suppose deprives some person of a right, privilege, or immunity secured by the Constitution of the United States. Is that State judge to be taken from his bench? Is he to be liable in an action? Is the old maxim of the law, that a judge for any judgment he gives can only be liable to impeachment, to be reversed and that judge dragged into a Federal court to be mulcted in damages if the Federal judge, no wiser than he, under no higher obligation to obey the Constitution than he, shall be of a different opinion?

217A Let it not be supposed that this is a fanciful case. There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense, forsooth, of honestly and conscientiously deciding the law to be as they understood it to be. There is a judge now in the State of Virginia, if I am not misinformed, who is under recognizance to appear in a Federal court to answer for the monstrous crime of having rendered a decision which the district attorney of the United States says is erroneous. There is a criminal indictment against him. And I believe the same thing has occurred in the State of Kentucky.

Is it intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment, which never lies in the absence of corrupt motive? Is that to be extended, so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used. These are my objections to the first section.

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SPEECH BY SEN. BOREMAN
IN SUPPORT OF THE BILL

* * *

229A If then these people in the southern States are entitled to the privileges and immunities of citizenship as they are defined by the courts of the country, is there a remedy under the Constitution? The preamble to the Constitution, which is declared by Judge Story, and I believe by Chief Justice Marshall, to be the key to this instrument, gives us to understand for what purposes it was ordained and established. The people of this country established this Constitution for certain purposes. In their language—

"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for the United States of America."

They ordained and established this Constitution for these purposes. While the establishment of justice therein referred to and the domestic tranquillity therein referred to may be said by the lawyers not to be applicable to this particular matter, yet it does seem to me that the latter part of the preamble, which declares that the purpose is "to secure the blessings of liberty to ourselves and our posterity," must enter into the subject and be taken into consideration when we come to construe the provisions of the Constitution. The Consti-

229A tution also declares that Congress shall have power—

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Now, sir, I apprehend—I do not know what other gentlemen think on the subject—that this provision of the Constitution is to stand in the same relation to the fourteenth amendment that it does to the Constitution as originally made, and that this guarantee of power in the Congress of the United States is as applicable to the fourteenth amendment as to any other portion of the Constitution. But whether that be so or not, we find that, in adopting the fourteenth article of amendment, care was taken to avoid the difficulties which had hitherto been thrown in the way of a fair construction of this great instrument by the gentlemen who were called the "strict constructionists" of this country; and the people of the United States in adopting the amendment declared:

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Then, sir, you have a declaration in the Constitution as it was originally adopted of the power in Congress; you have a declaration of the power expressly given in the fourteenth amendment for the enforcement of its provisions. But, sir, if these provisions did not exist without which Congress would have the power, properly speaking, to enforce the rights of these people who are being outraged at the

229A South, let us see what the authorities have said on this subject. Having settled the question as to what these rights are that are guarantied to the citizens, let us come to what the authorities say as to the remedy to which a party is entitled. In the forty-third number of the Federalist Mr. Madison said: "A right implies a remedy." In the forty-fourth number of the Federalist it is declared, and that is in discussing one of the provisions of the Constitution to which I have referred, that "no axiom is more clearly established, in law or in reason, than that whenever the end is required the means are authorized."

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229A Thus, Mr. President, it seems to me that not only from the plain reading of the Constitution itself with the addition of the fourteenth amendment, but upon the authorities and the decisions of the courts to which I have referred, there can be no question about the power of Congress. Would it not be the merest mockery to say that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights? While a power of this sort may lie dormant sometimes, and we may find that one who has been injured and who

229A has been damaged cannot find on the statute-book a remedy provided, yet the power is there, and it only requires the action of the legislative branch of the Government to bring it into being, to provide the machinery in order that the injured person may secure his rights.

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APRIL 14, 1871

COLLOQUY BETWEEN
SENATORS EDMUNDS AND THURMAN

696 Mr. EDMUNDS. My friend knows that when he goes to an argument or threatens one I am always convinced at once. [Laughter.] But the chief point now is, as my friend agrees, that here is, whether necessary or unnecessary, an express grant of power to us, the national Legislature, to defend the rights of citizens of the United States and all inhabitants of the country, whether citizens or not, against slavery. Now, how are you going to do it? Are you going to do it by passing a proclamation to the State of Georgia when she may choose to reënslave her negroes? Or, are you going to do it by making war upon her? Or, are you going to do it, as we by this bill do it under the fourteenth amendment, by declaring that any man who infracts that article shall be punished?

I take it, there is only one answer to that question. If any State should undertake to set up slavery, or any man in a State should

696 undertake to set it up, (because the old theory was that the States did not set it up at all, that it was a kind of hereditary personal right that came down from the patriarchs in some undefined way,) my friend from Ohio would be among the most earnest opponents of any legislation which should address itself to the State of Georgia. He would say, "The State of Georgia is not in fault; she cannot as a State be in fault at all, because her officers, her Legislature, her Governor, her judiciary, all together as such, have no power or authority to do anything of the kind, and their acts, therefore, are utterly void, and the people in their collective capacity are not responsible for them at all; and you have no right to make war upon the people because their officers, their mere agents whom they have selected, have exceeded their jurisdiction and authority. Go," he would say, "to the guilty ones. Address yourselves to the criminal who has violated this article of the Constitution and the statutes of the United States by doing that which the Constitution forbids."

Thus you will have enforced the thirteenth article of amendments and secured liberty and punished slavery. It would be an extreme case which could justify any other answer; and inasmuch as slavery is so odious to mankind now, gentlemen of all political shades would acquiesce, and there would not be a debate or a party division upon the passage of a bill which should provide for the punishment of the act of reducing any man to slavery, under the thirteenth amendment. Nobody, I

696 venture to say, would have been heard to open his lips to condemn such legislation, however much some portion of the people might desire to see slavery restored, or to question the propriety or the constitutionality of enacting it.

But when you take the next step and come to the next article of the Constitution, which secures the rights of white men as much as of colored men, you touch a tender spot in the party of our friends on the other side. If you wish to employ the powers of the Constitution to preserve the lives and liberties of white people against attacks by white people, against rapine and murder and assassination and conspiracy, contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion, contrived for the purpose of driving them from a city or town where they have endeavored to carry on a peaceable and lawful business or to cultivate the soil, then the whole strength of the Democratic party and all its allies is arrayed against the constitutionality and propriety of such an act.

Sir, what did the fourteenth amendment say, taking it a little in detail? The first section of it is all that I need to read. It has four distinct and separate clauses. The first is the one upon which I have commented, and I will now only state it:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

696 I have said prematurely, in answer to my friend from Illinois, and out of the order of the proper discussion of this subject, all that I will take the time to say about it. The next is the provision that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

There is a direct prohibition to the State; it is a direct prohibition against the making of a law; it is a direct prohibition against the enforcing of a law; and that perhaps brings me to the question here as well as anywhere else, what is a State?

My honorable friend from Ohio [Mr. THURMAN] said yesterday, my friend from New Jersey [Mr. STOCKTON] said the other day, and everybody says on that side, that a State is the legislative department, and that all the prohibitions and commands of this section are addressed to the law-making power of a State, and that any omission of the Governor to give rights under his department, any omission of the judiciary to grant rights under their department, any violation by either of these departments of a State government of any right secured by this section, is not a violation by the State, for that must be by the law-making power. Now, apply it to this:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Not "abridge the privileges and immunities of citizens of one State going to another," as the old language was, but "which shall

696 abridge the privileges and immunities of citizens of the United States," whether they are citizens of one State or another—absolute and complete. But what is the State? Is it the Legislature? It is as to making law, with the aid of a Governor. As to enforcing a law, is the Legislature the State? How do Legislatures enforce laws? I had been taught in my little reading and experience in the profession of the law that the enforcement of the law belonged to the judiciary and the executive combined. I had never heard before that it was a part of the legislative functions of a government to enforce laws; and yet, if my friend is right, although the very word "enforce" is used in this prohibition, it is after all only a command to the members of the Legislature that they shall not enforce any such law; and therefore the executive and the judicial departments of the State are not prohibited from enforcing any law they please which violates the privileges and immunities of citizens of the United States.

Why, Mr. President, this is absurd; it flies in the face of the very language, it flies in the face of everything we know of the nature and constitution of a government, be it State or national.

Mr. THURMAN. Will the Senator allow me to interrupt him at this point?

Mr. EDMUNDS. With the greatest pleasure.

Mr. THURMAN. I do so because the Senator has attributed to me quite a mistake.

Mr. EDMUNDS. I thought it was quite a mistake.

696 Mr. THURMAN. Either the Senator did not understand me, or I do not understand him. The language is, "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens." He will admit at once that it is only the legislative power in a State which can make a law. He will also admit at once that the courts and the executive power of the State do not enforce laws that are not made by the State, or not recognized as law by the State, being the common law of the State. Therefore, when it is said there that "no State shall make or enforce any law," it can only apply to laws which are made by the Legislature of the State, or to the common law of the State.

Mr. EDMUNDS. I do not see that that changes it. That is exactly what I said. Of course, if the Legislature do not make a law which abridges the privileges or immunities of citizens, then there is no such law that the other departments of the State government can enforce But suppose the Legislature does make a law which abridges the privileges of a citizen, and suppose that the judicial and executive departments of the State government undertake to put it in force; what then? According to his argument you can only punish the Legislature; you can make war upon them or you can indict them, or do whatever our friends on the other side think would be adequate to the end; and I should like any one of them to be kind enough to point out what he would do in such a case. What, then, was the use of putting in this prohibition against

696 enforcement? None at all in that case. I repeat, with all respect to my friend, that an argument of that kind borders, if he will pardon me for saying so, upon absurdity.

The enforcement of laws, as I have said, does not belong to the legislative department at all; it belongs to the other departments; and as to the enforcement of law, the other departments are the government; they are the whole government. Why, sir, what a position we should be in if this honorable Senator's position were sound! Look at our case with England during the rebellion. There were the acts of Parliament which denounced punishment against the fitting out of expeditions against friendly Powers; there was the executive department, the Crown, armed with all its constables and sheriffs and its military power; there was the judiciary in the full exercise of its functions. Through the fault of the Executive and through the fault of the judiciary expeditions were fitted out; they did make war upon our commerce; they did violate our rights. "Now," says my friend, "the Crown and the judiciary of England are not the Government; they are to blame, but they are not the State; the duty of executing the statutes of England does not belong to them, or if it did, they are not responsible for not doing it; the power of England is in the Parliament; and inasmuch as Parliament had done all that was necessary for it to do before, as the statutes were there, England is not responsible at all." That doctrine cannot be maintained. A State is a corporation; it exists only, in contempla-

696 tion of law, as an organized thing; and it is manifested, represented entirely, and fully in respect to every one of its functions, by that department of its government on which the execution of those functions is respectively devolved. Therefore, if it is the duty of the executive and judicial departments of a State to enforce a law and they do not enforce it, the State does not enforce it. If it is their duty not to enforce a law and they do enforce it, it is the State that enforces it.

* * *

697 Therefore, I take it, Mr. President, that I need not occupy much time in saying that whatever this provision of the fourteenth article guarantees to a citizen, that the citizen is entitled to have; and if he is entitled to have it, how is he to have it? The section answers, he is to have it in the language of the Constitution, which is the voice of the people, through the legislation of this body. The people have declared that he shall have this protection. The people have declared that the State authorities shall not deny it to him. The people have declared that it is the solemn duty of Congress to see that he has it because they have decreed that "Congress shall have power to enforce the provisions" of this section of this clause "of this article by appropriate legislation." Therefore the Constitution contemplated that whenever an occasion should arise where it was necessary to protect these rights Congress should protect them.

697 It is impossible to resist the conclusion. Suppose this did change the Government, as my friend from Illinois appears to fear, do you not rather think, Mr. President, that it is a good change? If the Constitution did not before, holding a sovereignty over its citizens, have the faculty of, through its legislative branch, protecting those citizens in the rights that the Constitution gave them, the rights which a common human nature gives them, against any assault by any State or under any State or through the neglect of any State, then it was high time, for the honor of the American name and for the rights of humanity, that the institutions of this country should change.

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APRIL 18, 1871

EXPLANATION BY REP. SHELLABARGER TO THE HOUSE OF THE 1ST CONFERENCE COMMITTEE REPORT (REGARDING MODIFIED SHERMAN AMENDMENT)

* * *

751 This, I believe, is the last matter of difference between the two Houses except that relating to what is known as the "Sherman amendment." I have not the means of referring the House to the exact words of that amendment as agreed to by the committee of conference except as they are contained in our report, which, however, is, I understand, printed in the Senate proceedings as published in this morning's Globe.

751 I will now state, Mr. Speaker, accurately if I can, what the effect of this section will be as agreed to by the committee. First, it does make a liability for a class of damages or injuries which result from riotous disorders. It must be kept in mind no other damages except damages produced by riot are within the section. In all these other damages in the second section by conspiracy or anything of that kind which do not amount to riot—and that has its well-known legal significance, and means two or more persons tumultuously assembled and doing unlawful acts and doing them in an unlawful way, by force and violence—if it comes short of that offense committed tumultuously in the face of the community, then it is not within the section at all. Nothing is in it but such disorder as that.

Next, the amendment agreed to by the committee of conference completely changes the remedy granted for the mischief, by preventing a claimant entitled to recover from resorting to property of individuals at all and confining his right of recovery to the county or city in which the mischief was done. If done in a city, then the action must be against the city. If in a county and outside of a city, the action must be against the county; and of course the people of a city as tax-payers in the county being to that extent liable. Then, as to the method of enforcement of the judgment when recovered, it provides they shall have the remedies applicable in cases of judgments against corporations of this municipal character. It does no more. It provides for

751 enforcing judgments by *mandamus* or by any other appropriate remedy applicable in like cases. It goes to that extent exactly, that such judgments may be enforced in the known and usual methods of the law.

It does more. It permits the parties who did the mischief to be united as defendants along with the municipality sued. It does still more; it requires the municipality shall not be made liable to pay that judgment until there is execution returned showing the money cannot be made out of the individual defendants. It requires two months to elapse before judgment can go against the municipality. It requires at first the exhaustion of the means of collecting the liabilities from the individuals doing the mischief. It puts the city or county in the position of guarantor, provided any other parties are sued. The county or city being interested in having such defendants can move to have any party made defendant to a suit for its own protection. Thus we have guarded, as well as it could be done, the county or city by appropriate proceedings.

The Senate I need not say was exceedingly earnest and positive in insisting there should be something of the character retained in the bill, and it was impracticable to procure the yielding of the Senate from that in some shape.

Now, then, Mr. Speaker, this is the report.

The question now of duty is of course before the House. It is entirely too late to enter on a discussion of a question so intricate in some of its aspects as well as so new in some of its

751 aspects as the question made in regard to the right to pass this Sherman amendment as we call it. I have chosen to put down in writing some statements in behalf of myself, at least, as a member of the committee in vindication of the right of the Government of the United States through its Congress to do the thing provided for in this section, and with the indulgence of the House I will read what I have written in order that I may be short.

* * *

751 Three propositions are by these principles thoroughly established:

First. That the Government's duty to the citizen includes protecting against a mob the property of such citizen.

Second. That it is strictly within the scope of the legislative power of any Government, whose duty it is to protect a given privilege of a citizen against a mob's invasion of such privilege, to assess the damages of such invasion upon a prescribed subdivision of that government which owes such duty to protect.

Third. That so to assess the damages against such local division of the government is neither a taking of private property for public use, under the power of eminent domain, nor is it a violation of the Magna Charta, nor of the Bill of Rights, protecting property from being taken except "by due process of law." Even the dissenting opinion of Ingraham in Darlington *vs.* New York, (31 New York Reports, 206,) so expressly admits, for it says:

"That a law is valid making the county in which property shall be destroyed or injured by a mob or

751 riot liable to the party injured I have no doubt."

If, therefore, this law is unconstitutional, it is not because it takes the property of peo-

ple who did not do the wrong to pay for the destruction of property by a mob, nor is it because it violates the right to "due process of law," nor is it because it is outside of the functions of a government which owes the protection of that particular right which the mob invaded. If this amendment is not invalid for these reasons, then what are the reasons which make it unconstitutional? There can be but three, to wit: either, first, that the right which this amendment seeks to protect is not one which the Government of the United States has jurisdiction to protect; or second, if it has the power to protect it, then that this section is not in its nature "appropriate" as that word "appropriate" is used in the Constitution; or third, if it be both within the class of things which Congress may protect, and this method is "adopted" to protect it, then that it is incompetent for the United States to inflict liabilities and resulting taxes upon a municipal corporation or an integral part or creature of a State.

But this amendment confines itself in express words to protection of a right conferred under the Constitution and laws of the United States; and to say we can pass no law to protect a right given by our own statutes and Constitution is not only to deny the power to pass this bill in any part of it, is not only to deny the United States the right to enforce its own

751 laws, but is to literally and self-evidently strip the United States of every attribute of government—is to place it precisely where the doctrine of secession and Buchanan's message placed it, with a Constitution but no power to enforce it, with laws but no right to execute them, with citizens but no attribute to defend them! I did suppose the war had by its frightful lessons taught us all that this Government, like all others, was a nation.

Then the first objection to this amendment, that to protect a right held under United States laws is not constitutional, cannot be maintained.

The next, that making communities or divisions of a State liable for riots which they tolerate is "appropriate" as a means of stopping them, is proved by the experience of at least six hundred years in most of the enlightened Governments of the world.

Really, therefore, the only question left is the third, to wit: whether, since a county is an integer or part of a State, the United States can impose upon it, as such, any obligations to keep the peace in obedience to United States laws. It is, in its legal significance, the same question we have heard before in these and other Halls, "Can the United States coerce a State?" To-day it is, "Can the United States coerce a county of a State, touching a subject-matter over which the United States has power to coerce every person in that county, to wit: touching there being or not being mobs in such county, kept up and perpetuated to defy the laws of the United States and destroy the rights

751 secured by these laws?" Those who deny this power of the United States to touch a county, as such, rest their denial on various grounds. One is that the United States would, by this amendment, be imposing a direct tax on the county to pay this judgment, and that this is prohibited. There are many reasons why this is not a sound objection. I shall state but one, to wit: that in so far as the enforcement of payment of judgments in the United States courts against counties or other municipal corporations may involve or require the assessment of taxes upon the people of such counties, it is completely established that such assessment of taxes can be compelled by the laws and courts of the United States in favor of a private suitor in United States courts. For these cases, where the Supreme Court of the United States holds that such taxes may be ordered by mandamus from United States courts, see Knox County *vs.* Aspenwall, (24 Howard, 384, &c.)

* * *

EXPLANATION BY SEN. EDMUNDS
TO THE SENATE OF THE 1ST CONFERENCE
COMMITTEE REPORT
(REGARDING MODIFIED SHERMAN AMENDMENT)

* * *

756 It is said that the United States cannot proceed against a municipality, either a county, town, or city, because they are the creation of State law; and therefore we cannot act upon them in their organized capacity at all. I will merely say in reply to that, what seems to me to be a perfectly conclusive answer, aside from answers that would exist at common law, that the Constitution declares that it shall be the duty of the State to give to everybody the equal and complete protection of its laws; and where, therefore, there is a State organism, as a county, which is intrusted with the local administration of justice, which is intrusted with the local preservation of peace, as every city, county, and parish in the country is in our autonomy and in every other civilized autonomy, then this clause in the Constitution which speaks of the protection which the States must afford to all their inhabitants equally under the law, to preserve them against riots and tumults, does speak, as was argued the other day—and I do not now intend to repeat it, but merely to explain the ground upon which this proceeds—to the municipal authorities existing under the State law directly; and when, therefore, they fail to perform the duty of protection, which the theory of this law implies that they are bound to perform, against tumult and

756 riot, then the Constitution has declared that Congress, by appropriate legislation, may apply to them the duty of making reimbursement. But I do not wish to go into an argument upon any principle we have discussed before. I merely say that in explaining the ground upon which it was made clear in my mind.

* * *

757 The ground upon which this rests is entirely separate from that. If it were not, I should see no constitutional objection to it. But it is quite a different thing; it is, given the legislative and constitutional responsibility growing out of the structure of the Government under these amendments and the duty of the authorities of the localities to protect people in the way and to the extent that the Constitution says they shall protect them, then it must follow that he who refuses that protection or denies it, be he a principality or a city, or a nation, if you please, is bound, if there is any value in the law at all, to make good the injury which the citizen who is entitled to that protection suffers; in other words, to bear the consequences of his own default. There is nothing in a violation of law, there is nothing in a default of the performance of public duty, unless it is to be followed by punishment or recompense, or both. That is all there is to it.

If here is a right and a duty which stops there, and which cannot be followed by any power that shall compel the protection of that right, or the performance of that duty, then

757 the Constitution and the law in all cases is sheer waste paper and government is at an end. No, sir; that cannot be so. Wherever there is a right to this protection; wherever there is a duty on the part of a State, or any of its organisms, to give this protection, and it fails, as in the case under this section of a tumult and riot, which it was the duty of the county or municipality to have guarded against and put down and have repressed, then it must follow as an incident to that, and as suitable and proper to that, in the judgment of Congress, depending upon its judgment and wisdom, that it may properly, in a constitutional sense, (and its wisdom I do not stop to argue at all, because it is so just that I think it will commend itself to everybody,) it must follow that Congress may provide that the particular municipality charged with the duty of preventing such riots and tumults shall make good to the sufferer in some way the consequence of its default, which has produced the suffering to him.

* * *

SPEECH BY SEN. MORTON
IN SUPPORT OF THE 1ST CONFERENCE
COMMITTEE REPORT

* * *

774 Again, we were told four years ago, and that has been repeated constantly since, that there was no constitutional power to pass the reconstruction laws, that there was no constitutional power to impose any limitations or conditions to the return to the enjoyment of political

774 rights of those who had been engaged in the rebellion; that they had the right to return to the full enjoyment of civil and political power without any conditions or limitations being imposed upon them by Congress, that there was no power to impose such conditions.

Mr. EDMUNDS. And Johnson issued his proclamation on that basis.

Mr. MORTON. Yes, sir. Then it was said last session when we passed the bill for the purpose of preserving the purity of the ballot-box in the election of members of Congress that we had no right to do that; the Constitution was torn and almost ruined by the passage of that act. And now we are told that we have no power to pass a bill for the protection of life and property and liberty in the southern States; that the recent constitutional amendments absolutely amount to nothing so far as giving to Congress any power for their enforcement is concerned. And so it goes; the history of the Democratic party for the last eighteen years at least has been one of denial; I do not mean by that self-denial, but it has been one of denial and negation.

For these reasons I am not alarmed by the declarations which have been made during this debate by distinguished Senators that this bill was a violation of the Constitution in every part; that it destroyed the existence of States; that it was a great and wicked usurpation of power. I think that the Constitution gives us the power to pass this bill, and that the condition of things in the southern States makes it our imperative duty to do so.

SPEECH BY SEN. FRELINGHUYSEN IN OPPOSITION TO MODIFIED SHERMAN AMENDMENT

* * *

777 But I doubt the constitutionality of the amendment. This General Government, as I understand it, deals with States and with citizens. It does not know such things as towns, parishes, and counties. They are the integral parts of States; they are entirely under the government of the States as political corporations, and the Constitution of the United States recognizes no relation between the Federal Government and these subordinate political corporations.

* * *

777 Therefore I do not see that the fourteenth amendment has changed the case in the least. We deal with States; we deal with the citizens; but I do not see in that amendment anything which authorizes the Congress of the United States to regulate the police regulations of the cities and counties of New York and New Jersey. We must remember that we are legislating for this whole nation, that we are legislating for all time, and we must touch with care the framework of our Government. Therefore I hope to see this provision of the bill, which was not reported by the committee, which met with its disapprobation, taken from the bill.

APRIL 19, 1871

SPEECHES IN OPPOSITION TO MODIFIED SHERMAN AMENDMENT

REP. WILLARD

* * *

791 Now, let me come to the amendment which for convenience has been called the Sherman amendment, the essential amendment put upon the bill in the Senate. I am not prepared to, and I shall not here enter upon any discussion of the constitutional power of Congress to resort to legislation of this character. But it seems very clear to me that if there is in the Constitution any power vested in Congress to resort to a provision like this for the punishment of offenses, or for giving redress to persons injured, this is very clearly an unwise and improper exercise of that power. So far as I know, the exercise of such a power by any Government is only warranted when the community upon which the penalty is visited, as by this section, has proved faithless to its duties, when it has not performed the obligations that rest upon it, and which it was abundantly able to perform, if it had the disposition to do so.

So under the old law of England if the hundred performed all that they were required to perform as good citizens they were no longer liable, and properly enough; and it was because they could not justly be made any longer liable that the limitation was fixed there.

791 There is in us all a sense of justice, which is stronger than even constitutional law itself. In our enactments, and in the administration of law, Legislatures and courts often stop at barriers which the Constitution has not placed in their way, because they see that justice compels them to stop at that point.

Now, sir, the Constitution has not imposed, we have not by the Constitution imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States.

In most of the States—it is so in mine, I know—the counties and the towns have no

791 power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, or if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of citizens, when perhaps no laws for its protection exists; for not giving me protection, when they have not been clothed by the State with the right and power to give me protection?

Thus it seems to me—and, as I said before, I am only arguing this point in the light of its justice, and not as a strict question of constitutional law—that we are imposing upon a community an obligation that we have no right to impose upon them, that in justice we cannot impose upon them for the reason that such municipalities are, as such, powerless to either make or enforce the laws of the State or of the United States. We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation. We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection.

I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable

791 to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State. . .

* * *

REP. POLAND

* * *

793 As I understand the theory of our Constitution, the national Government deals either with States or with individual persons. So far as we are a national Government in the strict sense we deal with persons, with every man who is an inhabitant of the United States, as if there were no States, towns, or counties; as if the whole country were in one general mass, without any subdivisions of States, counties, or towns. We deal with them as citizens or inhabitants of this great Republic. With these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever.

REP. BURCHARD

* * *

795 But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties are organized, at least in most of the States, for the management of the financial affairs of the counties. The county commissioners, county court, board of supervisors, or other body acting for the county, have power to levy taxes, but they do not have any control of the police affairs of the county and the administration of justice. These powers, I grant, are conferred in part by State laws upon some elective officers, such as the sheriff of a county, or justices of the peace and constables in the subdivisions of the counties and towns, &c. But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county

for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance.

* * *

SPEECH BY REP. PERRY
IN SUPPORT OF THE MODIFIED
SHERMAN AMENDMENT

* * *

Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate. Having asserted all those things by our previous action, we do not propose to go back upon it in the way of new debate. Having, then, that constitutional right and that legislative duty imposed on us, what further duty rests upon us? It is to adopt appropriate legislation to carry out that duty. Being constitutionally authorized to act, the questions upon this amendment are questions only of expediency and discretion. They do not rise to the dignity of constitutional questions.

* * *

SPEECH BY SEN. STEWART
IN SUPPORT OF THE BILL

* * *

Do the State constitutions furnish protection against these Ku Klux? The State governments to-day are in the hands of the Ku Klux as much as they were in the hands of the leaders of the rebellion during the war. They control the State organizations in many States.

* * *

Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Vol. I. "Introduction"

INTRODUCTION

The *Revised Statutes of 1873*, when published in 1875 in one volume, became the first complete revision of federal legislation by enacting into positive law all congressional legislation passed from 1789 through 1873. As is noted in all standard treatises on legal bibliography, this revision caused much dissatisfaction because of many errors as well as suspicion that the revisors had frequently exceeded their authority. Although a second edition did appear in 1878[1], it was never re-enacted into positive law. This unhappy experience in statutory revision forestalled the Congress undertaking any similar projects for nearly fifty years, when it authorized the publication of the *United States Code*. This set, however, has never been re-enacted *in toto* into positive law. Rather, since its inception, congress has been revising and re-enacting it, title by title. The latest issue of the *United States Code* is the 1970 edition covering legislation enacted through 1969. According to the preface in volume 1[2], nineteen titles of its fifty titles have been re-enacted into positive law. Thus, thirty-one titles are still only *prima facie* evidence of the law and the original authority for pre-1873 legislation for these titles is still found in the *Revised Statutes of 1873*.

It is clear, then, that the *Revised Statutes* are still of vital importance in the use and understanding of federal statutory law. It is ironic, considering that nearly a hundred years have passed, that there is not available an adequate legislative history of the *Revised Statutes of 1873*.

The need for such should be apparent and it is interesting to note that in 1960 Justice Frankfurter not only had occasion for such a legislative history, but cited erroneously another document as legislative history. This appears in *Monroe v. Pape*, 365 *U.S.* 167, 212, footnote 18, where he makes reference to *1 Revision of U.S. Statutes*, Draft (1872), 974. As will be pointed out, these volumes, technically speaking, are not *the* legislative history of *Revised States of 1873*.

History of the Legislative History of the Revised Statutes of 1873

In 1866 Congress passed a law (14 Stat. 74) authorizing the revision and publication of the permanent general laws of the United States. Under the authority of this Act, three Commissioners were appointed to carry out the revision. They were Caleb Cushing, Charles P. James, and William Johnson. By the Act of Mar. 2, 1867 (14 Stat. 455, 456) the Act of 1866 was extended by three years and three new commissioners were appointed. These were Charles P. James, Benjamin Vaughn Abbott, and Victor J. Berringer. They made several reports, but it was decided that their drafts were not acceptable, since they included too many substantial changes in the statutes and it would be impossible to enact a statutory revision proposing so many changes. Consequently, Congress by the Act of Mar. 3, 1873 (17 Stat. 579) placed the work of the revision under a joint committee of the House and Senate. This committee was authorized to receive the work of the commissioners and to discharge them. Their term of service expired on May 4, 1873. The joint committee was also authorized to appoint a person to complete the task of revising the statutes of the United States and selected

Thomas Jefferson Durant for this purpose. Mr. Durant then proceeded to revise the work of the commissioners and his revision was introduced in the 43d Congress, 1st Session, as H. 1215. The bill passed Congress and was signed by President U.S. Grant on June 22, 1874, published in 1875, and became the *Revised Statutes of 1873*.

The *Congressional Record* for January 21, 1874, (v. 182, 43d Cong. 1st Sess., p. 819, Jan. 21, 1874) refers to a report made by Durant to the joint committee, embodying a statement of the changes he had made in the work of the commissioners. In the *Checklist of United States Public Documents, 1789-1909*[3], p. 1524-25 (where the details of the efforts to publish the *Revised Statutes* are set forth) it is noted that "This report is supposed to have been published, though diligent search has failed to locate a copy."

It is apparent, then, that a complete legislative history of the *Revised Statutes of 1873* would require not only the draft of the Commissioners reprinted herein, but the missing report of Thomas Jefferson Durant. Until that volume is located, however, researchers will have to rely on and use the *Revision of the United States Statutes as drafted by the Commissioners*.

J. Myron Jacobstein
Roy M. Mersky

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[1] Revised Statutes of the United States. 2nd ed. Washington, D.C., U.S. Govt. Print. Off., 1878.

[2] United States Code, 1970 ed. v. 1, p. ix.

[3] Checklist of United States Public Documents, 1789-1909 . . . 3d ed. Rev. & Enlarged. Volume 1, Lists of Congressional and Departmental Publications. Compiled under the direction of the Superintendent of Documents. Washington, U.S. Govt. Print. Off., 1921.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RAY WILL,
Petitioner,
v.
MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF MICHIGAN STATE POLICE,
Respondents.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a State is a "person" subject to liability for money damages under 42 U.S.C. 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1207

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

The issue of statutory interpretation presented in this case—whether a State is a "person" within the meaning of 42 U.S.C. 1983—has obvious importance for state governments. This Court has never directly considered that question because, until recently, actions under Section 1983 were generally instituted in the federal courts, where the Eleventh Amendment bars an action against a State under Section 1983. See *Quern v. Jordan*, 440

U.S. 332 (1979). The Eleventh Amendment is, of course, unavailable as a defense in state court.

The court below correctly concluded that Congress did not intend to subject the States to damages liability under Section 1983. Because this Court's decision will have a direct effect on matters of substantial importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

1. Petitioner Ray Will became an employee of the State of Michigan in 1969. Four years later, petitioner applied for promotion to a position as a data system analyst with the Department of State Police. The police department ran a security check on petitioner, which turned up information about petitioner's brother, Charles Will, who had received extensive publicity for his anti-war activities and liberal political views during 1970 and 1971.[2] Petitioner was not promoted by the police department; he subsequently obtained an equivalent position with the state highway department. Pet. App. 11a; J.A. 35-36.

Petitioner did not learn that the police department's security check had uncovered information about his brother's political activities until 1977, when petitioner's brother obtained a copy of his police file. Petitioner filed a grievance with the state Civil Service Commission, asserting that the decision to deny him the promotion had impermissibly been influenced by his brother's political activities. The grievance was denied as untimely. Petitioner then commenced an action in Michigan circuit

[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

[2] Charles Will's police file was one of a number of such files maintained by the Special Investigation Unit of the Michigan Department of State Police. The Michigan state courts subsequently held that maintenance of these files on individuals' domestic political activities was unconstitutional. Pet. App. 11a; Pet. Br. App. 1a-8a; J.A. 70-73.

court against the state Department of Civil Service, the state personnel director, the Department of State Police, and the director of state police, alleging violations of the United States Constitution and the Michigan Constitution. He sought damages under both 42 U.S.C. 1983 and state law. The court remanded the case to the state Civil Service Commission for a grievance hearing. Pet. App. 11a-12a; J.A. 13-14.

The Civil Service Commission hearing officer held that the State had violated both the state constitution and state civil service rules. J.A. 34-48. He found that petitioner had established a "prima facie case of partisan considerations involved in the selection process" and that the police department had failed to rebut petitioner's showing that his brother's political activities were a substantial factor in the decision to deny petitioner the promotion. J.A. 45-47. The hearing officer awarded petitioner damages of approximately $200—the amount of salary he found that petitioner had lost as a result of the police department's employment decision. J.A. 47-48, 60. The Commission affirmed the hearing officer's determination. J.A. 49-52. Neither the State nor petitioner sought judicial review of that ruling.

2. In November 1978, while the grievance proceeding was pending before the state Civil Service Commission, petitioner filed suit in the Michigan Court of Claims. His complaint alleged a claim under 42 U.S.C. 1983 essentially identical to the claim asserted in the action before the state circuit court. Pet. App. 12a; J.A. 15-23. The court of claims action was consolidated with the circuit court case. J.A. 24-26, 27-30, 31-33.

In 1982, following the Civil Service Commission's decision, the state circuit court entered judgment in petitioner's favor on his Section 1983 claim. J.A. 59-67. The court held that the Commission's ruling established a federal constitutional violation because "the State having established a system of merit [promotion decisions],

• • • the denial of [petitioner's] promotion based on [petitioner's] brother's political persuasion violates due process." J.A. 61. The court also held that the Michigan Department of State Police and its director, sued in his official capacity, were included within the class of "person[s]" subject to damages liability under Section 1983 (see J.A. 61-65). Petitioner was awarded damages of approximately $153,000.[3]

The state court of appeals reversed in part and remanded in part. Pet. App. 124a-136a. It concluded that neither the State itself nor a state official sued in his official capacity could be held liable for money damages under Section 1983. The court remanded the case so that the circuit court could determine whether the director of state police was liable for damages in his personal capacity.

3. The Supreme Court of Michigan affirmed in part and reversed in part by a divided vote. Pet. App. 3a-123a. The court first held that the State was not a "person" subject to liability under Section 1983. It observed that this Court had concluded in *Quern v. Jordan*, 440 U.S. 332 (1979), that Congress did not abrogate the States' Eleventh Amendment immunity when it enacted Section 1983. The Michigan court stated that, because Congress adopted Section 1983 in large part "to provide a remedy in federal, not state courts," Congress would not have left the States' Eleventh Amendment immunity intact if it had intended to subject the States to any liability under the statute. Pet. App. 44a. In the court's view, Congress would not have chosen to " 'enact a statute creating a remedy for violation of civil rights, while at the same time precluding private individuals from bringing actions under the statute against states

[3] Only $584.64 of this amount represented lost wages. The bulk of the damages award was for loss of career opportunities ($40,544), emotional distress and mental anxiety ($56,052), and exemplary damages ($56,052). J.A. 79.

in federal court but permitting such actions against states in state courts' " (*id.* at 44a-45a (citation omitted)).

The Michigan Supreme Court noted that "the circumstances surrounding passage of § 1983" also supported its determination that the States are not subject to liability under that statute. Pet. App. 45a. Exposing the States to suits for damages would have been "a controversial proposition in 1871," but there was very little debate on the provision that became Section 1983. *Ibid.* The court concluded that the absence of debate indicated that Congress did not view Section 1983 as subjecting the States to damages liability.

Finally, the Michigan Supreme Court rejected petitioner's argument that Section 1983 authorizes suit against a state official in his official capacity. It held that an official-capacity action against a state official seeking retroactive relief is, in reality, an action against the State itself. Because a State is not a "person" under Section 1983, an official-capacity action cannot be maintained under the statute. Pet. App. 47a-54a.

Two justices dissented with respect to these issues. Relying upon Justice Brennan's concurring opinion in *Quern v. Jordan*, *supra*, they concluded that the States are included within the term "person" in Section 1983 and therefore are subject to liability under the statute. Pet. App. 117a-120a.[4]

[4] The Michigan Supreme Court also resolved a companion case in which another plaintiff had asserted an action for damages based on the Michigan Constitution. The court held that "[a] claim for damages against the state arising from violation of the Michigan Constitution may be recognized in appropriate cases," and it remanded the case to allow the lower court to consider whether damages were appropriate in the circumstances there presented. Pet. App. 9a, 10a; see also *id.* at 109a-117a, 122a-123a. Petitioner failed to preserve a claim for damages for violations of the Michigan Constitution (see *id.* at 98a-101a).

INTRODUCTION AND SUMMARY OF ARGUMENT

We agree with petitioner (Br. 9) that the question presented in this case is solely an issue of statutory construction—whether Congress intended the term "person" in 42 U.S.C. 1983 to include the States and thereby to subject them to liability for damages under that statute. But petitioner and his supporting *amici* err in assuming that this is a garden-variety issue of statutory interpretation, to be approached in the same manner as, for example, ascertaining the meaning of the term "interest in property" in the Bankruptcy Code (see *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 108 S. Ct. 626 (1988)), or the jurisdiction of the Provider Reimbursement Review Board under the Medicare Act (see *Bethesda Hospital Ass'n v. Bowen*, 108 S.Ct. 1255 (1988)).

This Court has recognized in a variety of contexts that before a court concludes that Congress has acted to limit the sovereign authority of the States, it must apply a legal standard far more rigorous than the test that governs routine issues of statutory interpretation: the court must find clear evidence that Congress intended to burden the States. That strict standard should be applied in determining whether Congress intended to subject the States to damages liability under federal law. Because Congress did not expressly include the States within the class of persons who may be sued under Section 1983, a damages claim may not be asserted against a State, a state agency, or a state official sued in his official capacity.

In any event, even if the routine statutory interpretation standard were applied to the question here, it is clear that Section 1983 does not authorize damages actions against the States. Congress used the term "person" to define the class of defendants subject to liability under Section 1983. This Court has held that that term excludes sovereigns such as the States, absent evidence

of contrary congressional intent. In this case, the other evidence of congressional intent is not to the contrary; it all weighs strongly in favor of construing Section 1983 to exempt the States from liability.

Legislators opposed to the bill that became Section 1983 devoted considerable attention to the intrusions upon state sovereignty that they believed would result from adoption of the statute, but no legislator mentioned suits for money damages against the States. That omission is strong evidence that Congress did not believe that the statute would have such an effect. In addition, this Court has repeatedly held that Congress intended damages liability under Section 1983 to be limited by the common-law immunities that were well established at the time the statute was enacted. No immunity was clearer in 1871 than the sovereign's immunity from suits for damages.

Moreover, Congress's principal reason for adopting Section 1983 was to provide citizens with a federal forum to vindicate their federal constitutional rights. If Congress had intended to create a cause of action against the States, it undoubtedly would have ensured that such claims could be brought in federal court. The fact that Congress did not abrogate the States' Eleventh Amendment immunity in enacting Section 1983 (see *Quern v. Jordan*, 440 U.S. 332 (1979)) confirms that Congress could not have wanted to subject the States to liability under the statute.

Finally, there is no basis for petitioner's claim that a suit against a state official in his official capacity should be treated as anything other than a suit against the State. As this Court recently observed, "the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder" (*Karcher v. May*, 108 S.Ct. 388, 393 (1987)). Petitioner accordingly cannot use this pleading device to circumvent Congress's decision to exempt the States from liability under Section 1983.

ARGUMENT

THE STATE OF MICHIGAN IS NOT A "PERSON" SUBJECT TO LIABILITY UNDER SECTION 1983

The Supreme Court of Michigan's conclusion that Section 1983 does not impose damages liability upon the States is correct for two separate reasons. First, because Congress did not clearly indicate that the States themselves were subject to suit under Section 1983, the statute should not be construed to have that effect. Second, even without resort to the "clear statement" rule, the outcome is the same. The statutory language and legislative history conclusively demonstrate that Congress did not intend to eliminate the States' sovereign immunity from damages liability when it enacted Section 1983.[5]

[5] Petitioner (Br. 25-27) and his supporting *amici* (Br. 10-11 & nn. 19-21) contend that the Court has already resolved this statutory question in petitioner's favor. This implausible assertion finds no support in the cases cited by petitioner and *amici*, none of which expressly addresses the issue presented here.

Indeed, the cited cases do not even implicitly support petitioner's contention. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Martinez v. California*, 444 U.S. 277 (1980), the States were not the sole defendants; state officials also were joined as defendants, either in their personal capacities on claims for damages or under the principle set forth in *Ex Parte Young*, 209 U.S. 123 (1908), on claims for injunctive relief. See pages 29-30, *infra*. Because the Court could properly have entertained both suits even if the States had been dismissed as defendants, the Court had no occasion to address the scope of the term "person" under Section 1983. Petitioner also relies on the fact that this Court has "debate[d]" (Br. 25) the States' ability to waive their Eleventh Amendment immunity without suggesting that, in the event of such a waiver, a Section 1983 claim would be dismissed for failure to state a claim. The Court's failure to address the issue one way or the other cannot be read as an endorsement of petitioner's interpretation of the statute; it merely indicates that the question is one that the Court has not resolved. Petitioner cites this Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), holding that interstate agencies are subject to suit under Section 1983, but the Court reached that result precisely because such agencies *differed* from States (see *id.* at 400-401).

A. Congress Must Clearly Indicate Its Intent To Subject The States To Damages Liability Under Federal Law And It Has Not Done So Here.

1. This Court has repeatedly recognized that the States occupy a special position in our constitutional system. See, *e.g.*, *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (referring to "the necessary existence of the States, and, within their proper spheres, the independent authority of the States"). The federal government is limited to the powers specifically delegated to it by the Constitution; the remaining powers are "reserved to the States" and to the people (U.S. Const. Amend. X). Moreover, the Constitution contains a number of limitations upon federal authority designed to protect the sovereignty of the States. See U.S. Const. Art. I, § 8, cl. 16; Art. I, § 9, cl. 5; Art. I, § 9, cl. 6; Art. II, § 3; Art. IV, § 3; Art. IV, § 4; Art. V; Amend. XI. And this Court has held that the Constitution implicitly bars Congress from exercising its delegated powers in a manner that infringes impermissibly upon state sovereignty. *Coyle v. Oklahoma*, 221 U.S. 559 (1911); see also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) (citing *Coyle*).

To be sure, the Constitution does not completely insulate the States against the power of the federal government; Congress retains considerable authority to enact legislation that directly or indirectly limits the States' freedom to choose for themselves the manner in which to exercise their sovereign authority. But even when there is no dispute that Congress has the constitutional power to act in a manner that trenches on state sovereignty, this Court has recognized that proper respect for the States' position in the constitutional scheme demands that courts take special care in determining whether Congress chose to exercise that power in a given instance. Thus, it is well settled that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention [to do so] unmistak-

ably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see also *Welch v. Texas Dep't of Highways*, 107 S.Ct. 2941, 2946-2947 (1987) (plurality opinion); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*).

The Court has applied a similar rule of statutory construction in determining whether Congress intended to exercise its power under Section 5 of the Fourteenth Amendment, stating that a court should "not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment" (*Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (*Pennhurst I*)). The Court has refused to find that Congress exercised that power absent clear evidence of congressional intent. *Id.* at 18. An analogous principle applies to congressional action under the Spending Clause: "if Congress intends to impose a condition on the grant of federal moneys [to a State], it must do so unambiguously." *Id.* at 17; see also *South Dakota v. Dole*, 107 S.Ct. 2793, 2796 (1987).

Yet another example of this general approach is the test applied to decide whether Congress intended to preempt state law. The Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress.*" *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added); see also *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Similarly, in determining whether Congress intended to exercise the full extent of its authority under the Commerce Clause, and thereby limit state authority over the subject of the federal legislation, the Court has consistently required a clear statement of congressional intent. *United States v. Bass*, 404 U.S. 336, 349 (1971); see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (state action exemption from the antitrust laws is grounded in deference to state sovereignty).

The Court has based each of these rules of statutory construction on the importance of according proper respect to the States' sovereignty and to the constitutional balance of authority between the federal government and the States. See *Atascadero*, 473 U.S. at 242 (Congress's power to abrogate the States' Eleventh Amendment immunity "means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain"; accordingly, a court must be certain that Congress intended to exercise that power before concluding that the States are subject to the jurisdiction of the federal courts); *Pennhurst I*, 451 U.S. at 16 (because legislation grounded in Congress's power under the Fourteenth Amendment "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," there is a special need to ensure that Congress actually intended that result); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (rule requiring clear intent to preempt state law "provides assurance that 'the federal-state balance' * * * will not be disturbed unintentionally by Congress or unnecessarily by the courts"); *United States v. Bass*, 404 U.S. at 349 ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

Congress's power to subject the States to damages liability under federal law intrudes upon state sovereignty in a manner at least as substantial as the federal actions discussed above. The rule that a sovereign cannot be sued without its consent surely reflects one of the most basic attributes of sovereignty. See page 23, *infra*. Holding the States liable in damages on a federal cause of action obviously interferes with this aspect of state sovereignty. In addition, the monetary burden imposed upon the States may well interfere with the States' ability to accomplish important policy goals. For these reasons, the States should not be subject to liability on a

federal cause of action absent clear evidence that Congress intended that result.

Indeed, this Court has already recognized that it is appropriate to insist upon congressional clarity in this area. In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), the Court faced the question whether the State of Iowa was a "white person" within the meaning of a statute that placed the burden of proof upon white persons in court actions adjudicating rights to property when an Indian is a party. The Court stated that in " 'common usage, the term "person" does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.' Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." 442 U.S. at 667 (citations omitted); see also pages 16-17, *infra*. *Wilson* states a more general version of the rule for which we contend here: broad language is not sufficient to subject the States to damages liability under federal law. Congress must unambiguously indicate its intent to subject the States to its authority in order to achieve that result.[6]

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[6] Petitioner cites (Br. 24) several cases in which the Court concluded that the States were subject to liability under a federal statute without requiring clear proof of congressional intent. But in those cases the Court acknowledged the principle of statutory construction for which we contend. It simply held that Congress's plain intent to subject the entire railroad industry to uniform economic and safety regulation established with the necessary clarity that Congress intended to cover state-owned railroads as well as privately owned railroads. See *California v. Taylor*, 353 U.S. 553, 562-564 (1957); *United States v. California*, 297 U.S. 175, 185-186 (1936); see also *Parden v. Terminal Ry.*, 377 U.S. 184, 188-189 (1964) (also relying upon congressional intent to regulate entire industry); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 280-282 (1959) (same approach in construing statute relating to maritime matters). That rationale obviously does not apply here because the question is not whether the States are to be subject to the same regulations as private industry; the issue is the definition

2. Petitioner argues (Br. 37) that this Court's decisions under the Eleventh Amendment are irrelevant here because there is no Eleventh Amendment issue in this case. Strictly speaking petitioner is correct: the resolution of the question whether a particular statute abrogates the States' Eleventh Amendment immunity is not automatically determinative of the question whether the statute creates a cause of action against the States. Congress could enact a statute that expressly preserves the States' Eleventh Amendment immunity but at the same time expressly includes the States within the class of persons subject to liability on the federal claim.

What petitioner ignores, however, is that this Court's Eleventh Amendment decisions are relevant in two more general respects. The first, which we have already discussed, is that the considerations of federalism underlying the rule of statutory interpretation applicable in the Eleventh Amendment context are equally relevant to the determination whether Congress intended to subject the States to damages liability on a federal cause of action.[7]

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of the class of state actors that Congress intended to hold liable in damages.

Moreover, the decisions cited by petitioner were rendered before the Court had clarified its Eleventh Amendment jurisprudence. As we have discussed, the standard now applied by the Court in the Eleventh Amendment context, and the Court's more recent decisions in related areas, establish that the test applied in *Wilson* is the proper approach in deciding whether Congress intended to burden the States by subjecting them to liability under federal law. (Petitioner asserts (Br. 24 n.14) that the plurality in *Welch* reaffirmed the prior conclusion that the States were subject to liability under the Federal Employers' Liability Act, but the *Welch* plurality did not address the State's statutory liability (see 107 S.Ct. at 2947 n.6)).

[7] Petitioner argues (Br. 37) that the Court has differentiated between the inquiry under the Eleventh Amendment and the question whether the States are subject to liability. But the decisions that petitioner cites leave open the second question, holding only that Congress did not abrogate the States' Eleventh

Second, the Court's Eleventh Amendment jurisprudence is relevant to the question presented here because of the close relationship between the issue of statutory construction under the Eleventh Amendment—whether Congress intended to subject the States to suit in federal court—and the question whether Congress intended to subject the States to liability at all. In the vast majority of cases, Congress does not expressly address either the States' susceptibility to liability in general or their susceptibility to suit in federal court, but it seems likely that Congress would expect the two issues to be resolved in the same way. When Congress creates a federal cause of action, its general assumption undoubtedly is that claims brought under that statute will be heard in federal court under the general grant of federal question jurisdiction (see 28 U.S.C. 1331) or under a more specific grant of subject-matter jurisdiction.[8] Indeed, it is difficult to see why Congress would wish to create classes of federal claims cognizable only in state court, at least absent special circumstances favoring that result. For these reasons, if Congress focused on the issue, it almost certainly would choose either to subject the States to suit in federal court or to exempt them from liability altogether.

Applying different statutory interpretation standards to the liability and Eleventh Amendment issues increases the chances that the two issues will be resolved differently. This would create a class of federal actions against the States that may be brought only in state court—a peculiar result that is most unlikely to reflect what

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Amendment immunity. See *Welch*, 107 S.Ct. at 2947 n.6 (plurality opinion); *Atascadero*, 473 U.S. at 238-240 n.2; *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279, 287 (1973). These decisions accordingly provide no basis for applying different statutory interpretation standards in these two contexts.

[8] For example, Congress provided for exclusive jurisdiction in the federal courts over claims under the Copyright Act (see 28 U.S.C. 1338(a)), undoubtedly assuming that all persons subject to liability for copyright infringement were subject to the jurisdiction of the federal courts.

Congress meant to accomplish. As this Court recently remarked, Congress would not make "[s]uch a major change in the existing rules * * * without specific provision in the text of the statute" (*United Savings Ass'n v. Timbers of Inwood Forest*, 108 S.Ct. at 634). Thus, to avoid a subversion of congressional intent, this Court should apply the same legal standard to both of these closely related questions of statutory interpretation.

3. Congress has not clearly expressed its intent to subject the States to liability under Section 1983. Nothing in the language of Section 1983 indicates that the States may be sued under the statute and, as we discuss in detail below (at 16-21), the legislative history contains no evidence that Congress intended or even anticipated that result.

Indeed, this conclusion is virtually compelled by *Quern v. Jordan*, 440 U.S. 332 (1979), in which this Court held that Congress did not intend to abrogate the States' Eleventh Amendment immunity from suit in federal court on claims under Section 1983. Although the *Quern* Court stated its ultimate conclusion in terms of the absence of a clear congressional intent to abrogate the States' Eleventh Amendment immunity, that conclusion rested on the determination that the statutory language and legislative history did not clearly demonstrate "that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States." *Id.* at 341; see also *id.* at 343. That very determination is dispositive in the present case: because Congress did not set forth with clarity its intent to override the States' sovereign immunity and subject them to damages liability, Section 1983 cannot be interpreted to impose such liability upon the States.

B. Congress Did Not Intend To Subject The States To Liability Under Section 1983.

Even if ordinary standards of statutory interpretation are applied in determining whether Congress intended to subject the States to liability under Section 1983, the only

possible conclusion is that Congress had no such intent. Again, the *Quern* Court's analysis of the relevant portions of the legislative history of Section 1983 leaves no room for the conclusion that the States themselves may be held liable in damages. The Court in *Quern* considered and rejected a variety of attempts to find in the legislative history evidence of congressional intent to subject the States to liability. Those same contentions cannot now be resurrected on the ground that *Quern* held only that Congress's intent was not "clear." Congressional intent simply cannot be sliced so thinly. The Court's unequivocal rejection of the arguments now advanced by petitioner precludes a contrary determination here. As Justice Brennan recognized in his separate opinion in *Quern*, the Court effectively determined in that case that "a State is not a 'person' for purposes of 42 U.S.C. § 1983" (440 U.S. at 350).

1. *The language and legislative history of Section 1983 show that Congress did not intend to impose liability on the States.*

As with any question of statutory interpretation, analysis of the scope of Section 1983 must begin with the relevant statutory language—here, the term "person." This Court has stated that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); see also *Wilson v. Omaha Indian Tribe*, 442 U.S. at 667 (applying this rule in holding that the term "white persons" did not include the sovereign States); *Stanley v. Schwalby*, 147 U.S. 508 (1893). This principle of statutory construction is especially applicable where the effect of construing "person" broadly would be to impose a burden upon the States. *Wilson v. Omaha Indian Tribe*, 442 U.S. at 667; *United States v. Knight*, 39 U.S. 301, 315 (1840); compare *Georgia v. Evans*, 316 U.S. 159 (1942) (holding that a State is a "person"

entitled to bring an action under the Sherman Act because States would otherwise be deprived of the *benefit* of the remedy prescribed by the federal statute).[9] The presumption may, of course, be overcome by evidence of contrary congressional intent. But a review of the relevant legislative materials supports rather than undercuts the conclusion that Congress did not intend to subject the States to liability under Section 1983.

Section 1983, originally enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, was not Congress's first venture into general federal civil rights legislation. Five years earlier, Congress had enacted Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, which imposed criminal penalties upon persons who deprived others of their constitutional rights. Section 1 of the 1871 Act created a federal civil remedy for conduct that violated Section 2 of the 1866 Act. Other provisions of the 1871 Act criminalized conspiracies to deny constitutional rights and authorized both the imposition of martial law and the suspension of habeas corpus in the event that a local insurrection went unchecked in any State. Although the 1871 Act was passed expeditiously, it was the subject of extensive and heated debate in both the House and the Senate. "The Act * * * was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility of abuse * * *." *Collins v. Hardyman*, 341

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[9] Petitioner bases his argument (Br. 23) for a broad construction of the term "person" upon this Court's statement in *Monell v. Department of Social Servs.*, 436 U.S. 658, 701 (1978), that "absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation," municipalities should be presumed to be "persons" under the statute. For the reasons we have already discussed (see page 12 and note 6, *supra*), that principle simply does not apply to the determination whether the States are encompassed within the term "person." Indeed, even the *Monell* Court recognized the distinctive role of the States by explicitly limiting its holding to "local government units which are not considered part of the State for Eleventh Amendment purposes" (436 U.S. at 690 n.54).

U.S. 651, 657 (1951). Two aspects of that debate shed light upon the question of statutory interpretation presented here.

First, "[g]iven the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act" (*Quern*, 440 U.S. at 343). In fact, although Congress extensively debated other provisions of the 1871 Act, very little attention was paid to Section 1 and the debates do not contain even a hint that the provision was intended to subject the States themselves to suits for damages. See *ibid.*; *Monell*, 436 U.S. at 665.[10]

Despite "anguished outcr[ies] from those committed to unrevised notions of state sovereignty," *Quern*, 440 U.S. at 364 (Brennan, J., concurring), none of the Act's opponents even suggested that Section 1 would erode the States' sovereign immunity, and possibly their fiscal integrity, by opening the door to damages actions against the States. The bill's opponents focused instead on the threat to state authority posed by the Act's martial law and habeas corpus provisions. See *Quern*, 440 U.S. at 341 n.10; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1466-1467 & n.257 (1975); Wolcher, *Sovereign Immunity and the Supremacy Clause*, 69 Calif. L. Rev. 189, 210 & n.79 (1981).

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[10] Most members of the 42d Congress accepted the proposition that Section 1 "merely carr[ies] out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 568 (1871) (Sen. Edmunds). See also Appendix to Cong. Globe, 42d Cong., 1st Sess. 68 (1871) (Rep. Shellabarger).

The most thorough and painstaking critique of Section 1 by a Southern Senator raised five separate objections to the provision, but omitted entirely from the parade of horribles any reference to potential state damages liability. See Appendix to Cong. Globe, 42d Cong., 1st Sess. 216-217 (1871) (Globe App.) (Sen. Thurman). This omission is particularly significant in light of the repeated allusions by Southern Members of Congress to the parlous financial straits of the vanquished South and the injustice of levying federal taxes on depleted state treasuries. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 336 (1871) (Globe) (Rep. Whitthorne); *id.* at 362 (Rep. Swann); *id.* at 377 (Rep. Waddell); *id.* at 379 (Rep. Shober). Such opposition as was leveled at Section 1 focused on the potential effects of the provision on individual officials rather than state governments. Representative Arthur stated that "[u]nder the provisions of this section every judge in the state court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread * * *." Globe at 366. Legislators raised fears of unlimited liability of legislative, executive, and judicial officers under Section 1. See, *e.g.*, *id.* at 385 (Rep. Lewis); Globe App. at 217 (Sen. Thurman).

If the notion that Section 1 subjected the States themselves to similar unlimited damages liability had been considered even remotely plausible, the bill's opponents undoubtedly would have raised such an argument in the debates. The only conclusion to be drawn is that "this silence on the matter is itself a significant indication" that Congress did not intend to subject the States to damages liability under the statute (*Quern*, 440 U.S. at 343).[11]

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[11] Petitioner's *amici* are simply wrong in asserting (Br. 5) that Representative Shellabarger "explained" that Section 1 authorized a remedy against the States. Representative Shellabarger said no

The debate over a challenge to the constitutionality of Section 1 raised by legislators opposed to the adoption of that provision also illuminates the question presented here. These legislators asserted that the bill was unconstitutional because the States were *excluded* from its proscriptions. "The language [of the Fourteenth Amendment] is 'No State' shall do this or that. Individuals nor a combination of individuals are mentioned, and yet they are to be brought under the provisions of the bill and the 'State' is to be exempted." Globe App. at 208 (Rep. Blair). Proponents of the bill answered this contention by arguing that the States acted through their officials, that the actions of those officials constituted state action reachable under the Fourteenth Amendment, and that Congress therefore had the power to impose liability on those officials. Globe at 661, 662 (Sen. Vickers); *id.* at 696 (Sen. Edmunds). The fact that the proponents of the legislation chose to defend the provision in this manner, without ever proffering the much more obvious explanation that the term "person" included the States as well, is powerful evidence that Congress did not intend to subject the States to liability.[12]

Petitioner (Br. 10-16) and his *amici* (Br. 5-8, 11-18) seize upon various statements in the legislative history to the effect that Section 1983 and the Fourteenth Amendment were intended to reach abuses of state authority; they assert that these passages demonstrate Congress's intent to subject the States themselves to damages liability. There can be no doubt that the target of both the Fourteenth Amendment and Section 1983 was unconstitutional state action; indeed, state action is the predicate for the application of the Fourteenth Amendment. But there is a clear difference between defining the types of unconstitutional abuses of state power that violate a statute and describing the class of defendants liable in damages for such unlawful conduct. These portions of the debate over Section 1983 relate directly to the former issue, but have no relevance at all to ascertaining Congress's intent with respect to the latter question.[13]

Petitioner also relies (Br. 18-22) upon the debate over the Sherman Amendment, a provision that, in its modified version, would have subjected local governments to vicarious liability for damages caused by mob violence. As a threshold matter, it is difficult to see how Congress's *rejection* of the Sherman Amendment can be interpreted to justify *imposing* liability upon the States. Petitioner states that the debate over the Sherman Amendment demonstrates that Congress believed it "could" impose damages liability upon the States (Br. 21, 22). But the question is not whether Congress thought it had the power to subject the States to this liability; the question is whether Congress intended to do so. And what is significant about the Sherman Amendment debate is that there was never even an attempt to impose this sort of vicarious liability upon the States, despite the fact that one Congressman suggested that course of action (see Globe at 791 (Rep. Willard)). That fact clearly demonstrates Congress's reluctance to intrude upon the States' sovereign immunity, and weighs heavily in favor of the conclusion that the States are not subject to any liability under Section 1983.

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such thing; he simply explained that the statute provided a remedy for unconstitutional abuses of state power. See pages 20-21, *infra*.

[12] Petitioner thus errs (Br. 17-18) in asserting that this aspect of the legislative history of Section 1983 weighs in favor of his interpretation of the statute. The discussion of action by government officials justified the imposition of liability on individuals for unconstitutional abuses of state power; it provides no basis for concluding that Congress intended to impute liability to the States themselves.

[13] Petitioner's *amici* appear to repeat this error in their contention (Br. 14-15) that Section 2 of the 1866 Act, the criminal statute that served as the model for Section 1983, was "directed at [the] states." There is no doubt that the statute is designed to criminalize unconstitutional state action, but it is equally clear that the States themselves are not subject to criminal liability under Section 2.

2. *Congress's intent not to override common-law immunities in enacting Section 1983 confirms that the States are not subject to damages liability.*

Even if the legislative history demonstrating that Congress did not intend to impose damages liability upon the States is put to one side, the conclusion is inescapable that a State is not a "person" within the meaning of Section 1983. This Court has consistently held that "the all-encompassing language of § 1983 [subjecting 'any person' to liability] * * * is not to be taken literally." *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983). "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Accordingly, "[w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, [this Court has] construed the statute to incorporate that immunity." *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

The Court has applied this principle in a variety of contexts. See *Stump v. Sparkman*, 435 U.S. 349 (1978) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity for executive officials); *Pierson v. Ray*, 386 U.S. 547 (1967) (judicial immunity); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislative immunity); see also Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 474 (1984); cf. *Owen v. City of Independence*, *supra* (no "good faith" immunity for municipalities under Section 1983 because of absence of common-law history of such immunity).

The rule that "the sovereign cannot be sued in his own courts without his consent" was "a familiar doctrine of the common law" in the post-Civil War era. *The Siren*, 74 U.S. (7 Wall.) 152, 153-54 (1869) ("It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government."); see also *Railroad Co. v. Tennessee*, 101 U.S. (11 Otto) 337, 339 (1880) ("The principle is elementary that a State cannot be sued in its own courts without its consent."); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); J. Dillon, *Treatise on the Law of Municipal Corporations* § 14 (1872). Indeed, while state sovereign immunity had common law roots reaching well back into English history (see generally 5 F. Harper, F. James & O. Gray, *The Law of Torts*, §§ 29.1-29.4, at 596-605 (1986)), the doctrine took on new practical significance after the Civil War, as States sought relief from debilitating debts. See Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 21 (1972).

No common-law immunity was better established in 1871 than the States' sovereign immunity from suit. Under this Court's settled approach in interpreting Section 1983, the only possible conclusion is that Congress must have intended to incorporate that common-law immunity principle to limit the scope of liability under the statute. For this reason, Congress could not have intended the term "person" in Section 1983 to include the States. See *Quern*, 440 U.S. at 342-343.

3. *Given the purposes of Section 1983, Congress would not have imposed liability upon the States while at the same time barring actions against the States in federal court.*

The principal purpose of Section 1983 was to provide a federal court forum for actions to remedy unconsti-

tutional uses of state power. See *Felder v. Casey*, No. 87-526 (June 22, 1988), slip op. 14 ("the principal remedy Congress chose to provide injured persons was immediate access to *federal* courts" (emphasis in original)); *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982) ("[I]n passing § 1 [of the Civil Rights Act of 1871], Congress assigned to the federal courts a paramount role in protecting constitutional rights."). Indeed, Congress was driven to create a federal remedy precisely because it believed that state courts were either unwilling or unable to provide a forum for effective vindication of federal constitutional rights. See, *e.g.*, Globe at 321 (Rep. Stoughton); *id.* at 374 (Rep. Lowe); *id.* at 459 (Rep. Coburn); Globe App. at 78 (Rep. Perry); *id.* at 252 (Sen. Morton); see also *Patsy*, 457 U.S. at 506-507; *Mitchum v. Foster*, 407 U.S. 225, 240 (1972); Nichol, *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 974-975 (1987). As Senator Osborn observed, "[i]f the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate." Globe at 653.

The concerns that led Congress to create a federal court remedy undoubtedly would be at their zenith in the event the State itself were the defendant in state court. To the extent that state courts were deficient in vindicating plaintiffs' federal rights as a general matter, it seems likely that those courts would be even more reluctant to decide a case in the plaintiff's favor where that determination would impose monetary liability on the State.[14] Accordingly, if Congress had intended to create a cause of action directly against the States, it certainly would have ensured that such actions could be brought in federal court. The fact that, as this Court held in *Quern*,

[14] This Court has stated that "[t]he defects Congress perceived in state courts lay in their jury factfinding processes" (*Felder*, slip op. 15 n.4). A jury would have been especially reluctant to return a damages verdict against a State a century ago because the judgment would have added to the State's liabilities and could thereby have increased the tax burden on all citizens.

Congress did not abrogate the State's Eleventh Amendment immunity is strong evidence that Congress did not intend to subject the States themselves to any liability under Section 1983.

Contrary to petitioner's contention (Br. 32-36), the historic limitations on federal question jurisdiction do not support an interpretation of Section 1983 that would permit actions against States only in state court. The anomaly in petitioner's interpretation of the statute is not simply that a federal claim could be brought only in state court. Rather, petitioner's argument would result in a large class of federal claims that could not be brought in federal court despite the fact that Congress's clear intention was to open the federal courts to claims cognizable under Section 1983. This anomaly is compounded by the fact that Section 1983 does not by its terms require the States to entertain claims under that provision. See *Martinez*, 444 U.S. at 283 n.7. Petitioner's construction of the statute could thus result in a cause of action that cannot be heard in any court.[15]

Petitioner's theory is anomalous for another reason as well. At the time Section 1983 was enacted, there had been few waivers of state sovereign immunity and, therefore, state courts simply did not have occasion to hear actions against a State. Those courts accordingly were not likely to have established the special rules of procedure—concerning jurisdiction, service of process, enforcement

[15] Petitioner argues (Br. 38-44) that there is no anomaly because the Congress that enacted Section 1983 would not have thought that the Eleventh Amendment barred actions against the State in federal court. Reduced to its essence, petitioner's argument is that this Court in *Quern* reached the wrong conclusion about Congress's intent to subject the States to suit in federal court. There is no basis for petitioner's second-guessing the Court's decision in *Quern*, which rested not on some abstract legal theorem, but on a close examination of the legislative history of the statute. The Court's conclusion that Congress did not intend to subject the States to the jurisdiction of the federal courts is dispositive of this issue.

of judgments, and the like—necessary to accommodate actions against the sovereign. It is exceedingly doubtful that Congress would have acted to saddle state courts with an entirely new class of cases that those courts were not equipped to adjudicate.

4. ***Policy arguments do not justify a broad expansion of Section 1983 liability.***

Petitioner's *amici* devote much of their discussion not to an analysis of the language and legislative history of Section 1983 but to various policy arguments that allegedly require the inclusion of States within the category of "persons" under the statute. These arguments, even if correct, would not justify a construction of Section 1983 that is at odds with congressional intent. See *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.*, 108 S.Ct. 830, 837 (1988). But in fact the arguments are not correct.

To begin with, contrary to the apparent view of petitioner's *amici* (Br. 19-27), this Court has never held that Congress intended Section 1983 to provide compensation to every plaintiff injured by a constitutional violation. Indeed, the Court has specifically rejected that approach, recognizing instead that Congress balanced conflicting policies in determining the scope of liability under the statute. See, *e.g.*, *Davis v. Scherer*, 468 U.S. 183 (1984) (applying qualified immunity test adopted by the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)); *Monell*, 436 U.S. at 690-694 (refusing to subject municipalities to respondeat superior liability and holding that local governments may be held liable only for injuries caused by unconstitutional government policies); *Imbler*, 424 U.S. at 422-423 (prosecutorial immunity is based on "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust"). Accordingly, there is no reason for the Court to disregard the clear evidence

that Congress did not intend to override well-settled principles of sovereign immunity when it enacted Section 1983.[16]

It is worth noting, moreover, that the interpretation of Section 1983 for which we contend does not deprive prospective plaintiffs of all remedies for unconstitutional state action. First, a plaintiff may maintain an action for injunctive relief in order to protect himself against future harm. Second, state officials may be subject to monetary liability in their personal capacities. Third, state law may authorize an action against the State for unconstitutional conduct. Indeed, in the decision below, the Supreme Court of Michigan recognized a state-law action analogous to Section 1983 (see note 4, *supra*). It was petitioner's failure to preserve his state-law claim that rendered him unable to take advantage of that determination.

Petitioner's *amici* also contend (Br. 27-29) that the threat of constitutional violations will not be deterred sufficiently unless the States themselves are subject to suit under Section 1983. But these *amici* offer no empirical or other support for this assertion; there have been no rampant outbreaks of unconstitutional conduct despite the fact that Section 1983 suits against the States have been relatively infrequent and almost uniformly unsuccessful. We submit that experience has shown that the existing remedies, especially the availability of actions against state officials in their personal capacities, suf-

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[16] Indeed, recent events in Congress demonstrate the continued vitality of the legislative judgment made in 1871. Both before and after this Court's decision in *Quern*, legislation was introduced that would have expressly subjected the States to liability under Section 1983. See S. 990, 97th Cong., 1st Sess. (1981); S. 1983, 96th Cong., 1st Sess. (1979); S. 35, 95th Cong., 1st Sess. (1977); See also Sagafi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 St. Louis U.L.J. 373 (1983). None of the bills was even reported to the full Senate. Compare Pub. L. No. 96-170, 93 Stat. 1284 (1979) (overturning result in *District of Columbia v. Carter*, 409 U.S. 418 (1973)).

ficiently deter unconstitutional exercises of state power. See, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. at 814.

C. Petitioner Cannot Circumvent Congress's Decision To Exclude The States From Liability Under Section 1983 By Bringing An Official-Capacity Suit Against State Officials.

Petitioner contends (Br. 28-31) that even if Congress did not intend to subject the States to damages liability under Section 1983, a plaintiff may nonetheless circumvent Congress's design and recover damages from a State simply by changing the form of his complaint. According to petitioner, the statute authorizes a damages action against a state employee in his official capacity even if the State itself is not subject to liability. Petitioner is plainly wrong: attempted artful pleading cannot override congressional intent.[17]

This Court has repeatedly recognized that an action against a government officer in his official capacity "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent" (*Monell*, 436 U.S. at 690 n.55). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis in original; citation omitted); see also *Karcher v. May*, 108 S.Ct. 388, 393 (1987) ("the real party in interest in an official capacity suit is the entity represented and not the individual officeholder"); *Brandon v. Holt*, 469 U.S. 464, 471 (1985).[18]

[17] Even petitioner's *amici* acknowledge (Br. 3 n.2) that "a suit against * * * a state official in his official capacity is for all practical purposes a suit against the state itself" and do not attempt to defend the distinction drawn by petitioner.

[18] "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted); see also *Pennhurst II*, 465 U.S. at 101 n.11. That surely is the case here. Petitioner concededly seeks to recover funds from the state treasury; that is why he brought his action in the Michigan Court of Claims. See Pet. App. 127a-129a.

Since Section 1983 does not authorize suits against the States, and an official-capacity action against a state official is "in all respects other than name" a suit against the State, such an official-capacity action cannot be maintained under Section 1983.

Petitioner nonetheless asserts (Br. 28-29) that this well-settled rule does not apply here because the Court has already concluded in the context of actions for injunctive relief that official-capacity suits are cognizable under Section 1983. This contention rests on a basic misunderstanding of the grounds upon which Section 1983 actions for injunctive relief may be maintained in federal court. In *Ex parte Young*, 209 U.S. 123 (1908), a federal court had enjoined a state Attorney General from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of the injunction. The Court's rationale was that an unconstitutional enactment is "void" and that the state official was therefore "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." 209 U.S. at 160; see also *Pennhurst II*, 465 U.S. at 102.

The premise of petitioner's argument is thus incorrect; Section 1983 actions seeking injunctive relief may be maintained in federal court only because of the "fiction" (*Pennhurst II*, 465 U.S. at 102) that they are *not* official capacity actions, but are rather actions against the officer in his personal capacity.[19] As the Court noted in *Ken-*

[19] Contrary to petitioner's claim (Br. 27), the Court's holding in *Hutto v. Finney*, 437 U.S. 678 (1978), that attorney's fees may be awarded against the State in Section 1983 injunctive actions

tucky v. Graham, 473 U.S. at 167 n.14, "actions for prospective relief are not treated as actions against the State." The Court's affirmance of injunctions issued in those actions accordingly cannot support petitioner's contention that official-capacity suits for damages are cognizable under Section 1983.[20]

CONCLUSION

The judgment of the Supreme Court of Michigan should be affirmed.

Respectfully submitted,

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does not indicate that the State is a person within the meaning of Section 1983. The *Hutto* Court was construing a different statute—42 U.S.C. 1988—and relied upon legislative history that specifically authorized fee awards against a State even if the State was not a party to the Section 1983 action (see 437 U.S. at 694). The decision accordingly casts no light on the scope of Section 1983 itself.

[20] Of course, the fact that Section 1983 actions for injunctive relief have been categorized as personal-capacity suits for Eleventh Amendment purposes does not preclude a different characterization for other purposes, such as party substitution rules (see, *e.g.*, Fed. R. Civ. P. 25). Because such actions are personal-capacity suits for at least some purposes, however, this Court's decisions entertaining such actions without expressly addressing their status for Section 1983 purposes cannot be taken as an implicit determination that state officials sued in their official capacities are persons under Section 1983; rather, the Court's decisions can be read to support the conclusion that for Section 1983 purposes, as for Eleventh Amendment purposes, these suits are personal-capacity actions.

Supreme Court, U.S.
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No. 87-1207

In The

Supreme Court of the United States

October Term, 1987

RAY WILL,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

AMICUS BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. § 1983?

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No. 87-1207

In The

Supreme Court of the United States

October Term, 1987

RAY WILL,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

AMICUS BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in the outcome of this case. At least 29 state appel-

late courts[1] have explicitly held that their respective jurisdictions have concurrent authority to hear actions based upon 42 U.S.C. § 1983. Additionally, courts in 8 other states have held that their state courts have concurrent jurisdiction with federal courts to enforce rights granted under a federal enactment unless there is a prohibition

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1 *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala. 1981); *McClanahan v. Cochise College*, 25 Ariz.App. 13, 540 P.2d 744 (1975); Adler v. L.A. Unified School District, 159 Cal.Rptr. 528 (1979); *Durango School District No. 9-R v. Thorpe*, 200 Colo. 268, 614 P.2d 880 (1980); *Ziska v. Water Pollution Control Authority*, 195 Conn. 642, 490 A.2d 509 (1985); *Penthouse, Inc. v. Sava*, 399 So.2d 456 (Fla. 1979); *Wyman v. Popham*, 252 Ga. 247, 312 S.E.2d 795 (1984); *Makanui v. Dept. of Education*, 721 P.2d 165 (Ha. 1986); *Alberty v. Daniel*, 25 Ill.App.3d 291, 323 N.E.2d 110 (1974); *Thompson v. Medical Licensing Bd.*, 180 Ind.App. 333, 398 N.E.2d 679, *cert. denied*, 449 U.S. 937 (1979); *Alvarado v. City of Dodge City*, 10 Kan.App.2d 363, 702 P.2d 935 (1985); *Hughes v. Livingston Parish School Bd.*, 459 So.2d 10, *writ denied*, 62 S.2d 1250 (1984); *Thiboutot v. State*, 405 A.2d 230, *aff'd* 448 U.S. 1 (1979); *DeBleecker v. Montgomery County*, 427 A.2d 1075, *reversed on other grounds*, 438 A.2d 1348 (Md. 1983); *Rezeznik v. Chief of Police of South Hampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *State Tax Comm'n v. Vondren*, 387 So.2d 712 (Miss. 1980); *Tyler v. Whitehead*, 583 S.W.2d 240 (Mo.App. 1979); *Endress v. Brookdale Community College*, 144 N.J.Super. 109, 364 A.2d 1080 (App. Div. 1976); *Brody v. Leamy*, 393 N.Y.Supp.2d 243, 90 Misc.2d 1 (1978); *Snuggs v. Stanly County Dept. of Public Health*, 310 N.C. 739, 314 S.E.2d 528 (1984); *Kristensen v. Strinder*, 343 N.W.2d 67 (N.D. 1983); *Jackson v. Kurtz*, 65 Ohio App.2d 152, 416 N.E.2d 1064 (1979); *Rosacker v. Multnomah*, 43 Ore.App. 583, 603 P.2d 1216 (1979); *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986); *Moore v. Molinari*, 724 S.W.2d 860 (Tex. App. 1986); *Titus v. Progressive Glassworkers Union*, 301 S.E.2d 577 (W.Va. 1983); *State v. Tidwell*, 32 Wash.App. 971, 651 P.2d 228 (1982); *Terry v. Kolski*, 78 Wisc.2d 475, 254 N.W.2d 704 (1977); *Board of Trustees of Weston County School District No. 1 v. Holso*, 584 P.2d 1009 (Wy. 1978).

from doing so.[2] At present, no state appellate courts in this country have refused to exercise concurrent jurisdiction over § 1983 claims.[3]

A number of state and federal courts have addressed the question of whether the state or its officers, in their official capacity, are "persons" under 42 U.S.C. § 1983 reaching opposite conclusions. *See Smith v. Michigan*, 410 N.W.2d 749 at 763-64 (Mich. 1988) (Brickley, J., concurring) (most state and federal appellate court decisions have held that the state is not a "person" for purposes of § 1983). Since the vast majority of states have explicitly recognized concurrent state court jurisdiction over § 1983 claims, this Court's resolution of the issue will have a significant impact on future civil rights litigation in state courts.

Did the 42nd Congress intend the term "person" in § 1 of the Civil Rights Act of 1871 (predecessor to § 1983)

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2 *Ollstead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977); *McIntyre v. Monarch Feed Mills, Inc.*, 276 Ark. 1, 631 S.W.2d 307 (1982); *Jones v. Schlender*, 102 Ida. 776, 640 P.2d 1177 (1982); *American Commercial Lines v. Ostertag*, 582 S.W. 2d 51 (Ky.App. 1979); *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690 (Minn. 1985); *Hook v. Hook*, 101 N.M. 390, 683 P.2d 507 (1984); *Klesh v. Commonwealth Dept. of Public Welfare*, 55 Penn. Commonwealth 587, 423 A.2d 1348 (1980); *Woonsocket Historical Society v. City of Woonsocket*, 387 A.2d 530, 120 R.I. 259 (1978).

3 In *Martinez v. State of California*, 444 U.S. 277 (1980), this Court noted that it had "never considered . . . the question whether a state must entertain a claim under § 1983. . . . [Further stating] that where the same type of claim, if arising under state law, would be enforced in the state courts, state courts are generally not free to refuse enforcement of the federal claim. *Testa v. Katt*, 330 U.S. at 394, 67 S.Ct. at 814. *But see Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969)." *Id.* at 234 fn. 7 Amici states would note that the Supreme Court of Tennessee overruled the *Chamberlain* decision in *Poling v. Goins*, *supra*, at fn. 1.

to include a state or its officers in their official capacity, even though in 1871 the common law doctrine of state sovereign immunity and the Eleventh Amendment effectively barred suits against the state unless there was an express waiver by the state or abrogation by Congress? The amici states are in the unique position of being able to provide this court with insight in answering this question from their collective prospective.

STATEMENT OF THE CASE

The amici states adopt the statement of facts as presented by the Michigan Supreme Court, below, along with the statement of facts presented by the respondents in their brief. *See Smith v. Michigan*, 410 N.W.2d 749, 751-54 (Mich. 1987); Respondents' Brief, pp. 1-8.

SUMMARY OF ARGUMENT

Under the principles of statutory construction, it must be concluded that Congress did not intend the term "person" under § 1983 to include states or their officials in their official capacity. Within the historical context of Reconstruction, the enactment of § 1 of the Civil Rights Act of 1871 (predecessor to § 1983) was intended to vest federal courts with jurisdiction to hear civil suits brought by individuals deprived of their constitutional rights by a "person" under color of law. This Court held in the

Quern decision that § 1983 suits cannot be brought against the state in federal court because of the Eleventh Amendment. Why would the 42nd Congress have intended "person" to include states in § 1983 actions brought in state court when jurisdiction was originally vested with federal courts in 1871 due to the inability or unwillingness of state courts to act in response to the lawlessness of the Ku Klux Klan at that time?

More importantly, in 1871 it was generally recognized by this Court and throughout the country that a state could not be sued in any court, state or federal. There were two exceptions to this common law principle: (1) where a state consented to be sued, or (2) where the Constitution expressly abrogated sovereignty of a state. The concept of express Congressional abrogation of state sovereignty pursuant to constitutional authority was not developed at the time of the enactment of the Civil Rights Act of 1871. There is no doubt that the Fourteenth Amendment authorized such Congressional abrogation; however, § 1 of that Act did not abrogate either the Eleventh Amendment or state common law sovereign immunity. Since no relief could be obtained against the state in either state or federal court, the conclusion is inescapable that Congress did not intend states to be "persons" under § 1983.

Likewise, state officials being sued in their "official capacity" were not intended to be "persons" under § 1983. The notion of "official capacity" suits was not recognized until 1908 by this Court in *Ex Parte Young*. The 42nd Congress could not even conceive of being able to bring suit against a state official as an indirect action against

the state. Damage actions could not and cannot be maintained against state officials in the "official capacity" in federal court (Eleventh Amendment) or state court (common law sovereign immunity). As for equity actions against state officials, this court in *Ex Parte Young,* although recognizing the necessity of the legal fiction, noted that such suits do not affect state sovereignty.

Amici states urge this Court to rely upon the historical context of the enactment of § 1 of the Civil Rights Act of 1871 as its touchstone in deciding this issue. Once the foundation of state sovereign immunity as it existed in 1871 is laid, the answer becomes clear: Congress did not intend the state or its officers, in their official capacities, to the "persons" under § 1983.

ARGUMENT

I. UNDER THE PRINCIPLES OF STATUTORY CONSTRUCTION, IT MUST BE CONCLUDED THAT THE FORTY-SECOND CONGRESS DID NOT INTEND THE TERM "PERSON" UNDER § 1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE STATES OR ITS OFFICERS IN THEIR OFFICIAL CAPACITIES.

In construing the meaning of words in a statute, this Court has indicated in the past that the plain and ordinary understanding of that language should be employed.

Perrin v. U.S., 444 U.S. 37, 42 (1979). The term "person" in 42 U.S.C. § 1983 within the context of this case, however, is unclear and ambiguous. Therefore, reliance on any purported plain meaning of the term "person" is of no use. In order to determine congressional intent as to the meaning of that word, resort must be had to the principles of statutory construction.[4] In particular, there are two principles that are helpful in this instance.

First, this Court has indicated on a number of occasions that in construing acts of Congress, courts may look to the history of the times when the legislation was enacted to ascertain the reason as well as the meaning of particular provisions. *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 292 (1951); *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961). Likewise, this Court has indicated in other contexts that whether the terms "person" or "corporation" in a statute include a state or the United States, depends upon the context of the legislative environment. *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *Ohio v. Helvering*, 292 U.S. 366, 370 (1934).[5]

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[4] Although the petitioner indicates in the opening argument of his brief that the meaning of the term person in § 1983 is "a matter of ordinary statutory construction", no reference to any rules of statutory construction are made by the petitioner. Rather, the petitioner simply launches into a lengthy general discussion of the debate surrounding the enactment of the Civil Rights Act of 1871 interspersed with quotations from Senators and Representatives concerning the authority of Congress to enact §§ 2-6 of the Act which are of no value in determining congressional intent as to the meaning of "person" in 1 of the Act. Petitioner's Brief, pp. 9-22.

[5] In applying these rules of statutory construction to the term "person" as originally enacted in 1871, the amici states rely

(Continued on following page)

The second pertinent rule of statutory construction is that statements by legislators are not controlling as to statutory intent. *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979). More specifically, this Court has indicated that oral testimony of congressmen during legislative debates, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the language of the statute itself. *Regan v. Wald,* 468 U.S. 222, 237 (1984). Thus, unless the statements of members of Congress during legislative debates as to the meaning of a particular word are specific to that word, those statements are of little value in ascertaining congressional intent.

In applying the first principle of statutory construction to § 1 of the Civil Rights Act of 1871, a discussion of the original purpose for § 1 will aid this Court in understanding why the 42nd Congress never intended states or their officers to be considered persons under that enactment. More importantly, a historical review of the doctrine of sovereign immunity from its origins in England to the mid-19th century in America, provides compelling evidence that the 42nd Congress could never have intended states or their officers to be subject to suit in either state or federal court under § 1 of the Civil Rights Act of 1871.

(Continued from previous page)

upon the state of the law as to sovereign immunity and the Eleventh Amendment as it existed at that time. Accordingly, references to post-1871 cases are omitted in this portion of the argument. However, subsequent decisions of this Court support amici states' position that the 42nd Congress did not intend states or the officers to be "persons" under § 1 of the Civil Rights Act of 1871. *See, infra,* pp. 16-22.

In the years following the Civil War, lawlessness in the states of the old Confederacy was rampant. At the center of this chaos was the Ku Klux Klan, which harassed and murdered both black persons and those white persons whose sentiments lay with the Union. By 1871, President Ulysses S. Grant knew that the federal government would have to take action. Thus, on March 23, 1871, President Grant sent the following message to Congress:

> A condition of affairs now exists in some of the states of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. *That the power to correct these evils is beyond the control of the state authorities I do not doubt;* that the power of the executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation in the judgment of Congress shall effectively secure life, liberty, and property in the enforcement of law in all parts of the United States. (Emphasis added).

Congressional Globe, 42nd Cong., 1st Sess. 236 (1871) (Cong. Globe).

It should be remembered that by the time of President Grant's message in 1871, the Thirteenth, Fourteenth, and Fifteenth Amendments had been adopted; moreover, Congress had enacted the Civil Rights Act of 1866, the Enforcement Act of 1870, and the Enforcement Act of 1871. However, President Grant in the language of his message, felt that an emergency situation existed in the South which needed additional federal legislation. Presi-

dent Grant's reference to the lack of control by state authorities is further supported throughout the debates by examples of where state authorities, including state courts, were unwilling or unable to control the lawlessness. In that regard, Representative Stoughton stated the following:

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The state authorities and local courts are unable or unwilling to check the evil or punish the criminals.

Cong. Globe, 321 (1871) (Rep. Stoughton).

Congressional reaction to these horrors was the enactment the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Sections 2 through 6 of the Act dealt specifically with the emergency situation in the South. More specifically, § 2 of the Act made it a crime for two persons to conspire together to violate the civil rights of another person.[6]

On the other hand, § 1 of the Act was simply the civil version of the provision in the Civil Rights Act of 1866 which made it a crime for any person under color of law to violate the civil rights of another person. § 2, Civil Rights Act of 1866; § 17 Enforcement Act of 1870. In particular, § 1 of the Civil Rights Act of 1871 provided the following:

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[6] In fact, most of the debates relating to the Civil Rights Act of 1871 concerned whether Congress had the authority to enact such a provision. *Monell v. Dept. of Social Services*, 436 U.S. 658, 667 (1978).

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state shall subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which, as such citizens, he is entitled under the Constitution or the laws of the United States, shall, any such laws, statute, ordinance, regulation, custom or usage of the state to the contrary notwithstanding be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, etc.

It is quite clear that Congress intended to provide individuals who were victims of civil rights deprivations in the South with a civil remedy in federal court. State court judges were unwilling or unable to provide relief to these victims; accordingly, Congress vested jurisdiction to enforce these rights with federal courts.[7] In establishing this new remedy, did Congress intend that individuals could bring suits under § 1 against a state or its officers in their official capacities?

The answer to this question lies in a historical review of the development of sovereign immunity and the Eleventh Amendment. The common law doctrine of sovereign immunity originated in England under the simple principle that "the king could do no wrong". Accordingly,

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[7] It appears that Congress originally intended federal jurisdiction in 1871 to be exclusive. *Smith v. Dept. of Public Health*, 410 N.W.2d at 755 (Brickley, J., concurring). Why would Congress have intended states or their officers to be "persons" for purposes of § 1983 actions in state court when state courts originally had no jurisdiction to hear § 1983 claims?

the king could not be sued in his own courts without his consent. *Chisholm v. Georgia,* 2 Dall. 419, 437-46 (1794) (Iredell, J., dissenting).

The ratification of the Constitution in 1788 established the federal court system and authorized the federal judiciary to entertain actions involving the states, but only in the following circumstances:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made under their authority—to all cases effecting ambassadors, other public ministers and counsuls; to all cases of admirality and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states and between a state or the citizens thereof and foreign states, citizens or subjects.

U.S. Const., Art. III, § 2.

The question arose as to whether the language "controversies between a state and citizens of another state" authorized federal courts to entertain lawsuits filed by a citizen of one state against another state. This question was answered in the case of *Chisholm v. Georgia,* 2 Dall. 419 (1794) in which this Court held that the State of Georgia was subject to a suit by a citizen of the State of South Carolina for a revoluntionary war debt. In essence, this Court recognized the sovereignity of the State of Georgia; however, when the State of Georgia ratified the Constitution, it agreed to the terms of the Constitution which included federal jurisdiction over actions by citizens of one

state against another state. In other words, the Constitution, by its express terms, abrogated state common law sovereign immunity. The immediate reaction to the *Chisholm* decision in this country was the adoption of the Eleventh Amendment which, in effect, overturned that decision.

As for the sovereign immunity of a state in its own courts, the common law principle was carried from England to America during the 19th century. By 1871, a number of state courts held that the state could not be sued in its own courts without its consent.[8] Interestingly enough, a number of states even embedded the doctrine of sovereign immunity into their own constitutions during the 19th century. Most of these state constitutions provided that suits could be brought against the state only in such manner and in such courts as the state legislature provided.[9]

More significantly, this Court recognized the common law doctrine of state sovereign immunity to bar suits against states without their consent in all courts. In particular, Justice Taney stated:

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[8] *Turner v. State,* 27 Ark. 337 (1871); *Hunsaker v. Borden,* 5 Cal. 288 (1855); *Tracy v. Hornbuckle, 8 Bush* 336 (Ky. 1871); *Westin v. Dane,* 51 Me. 461 (1862); *Michigan State Bank v. Hastings, 1 Dougl.* 225 (Mich. 1844); *Myers v. Zanesville and M. Turnpike Co.,* 11 Ohio 273 (1842); *Williams v. Register,* 3 Tenn. 214 (1812); *Marshall v. Clark,* 22 Tex. 23 (1858).

[9] Arkansas—Art. I, § 17 (1868); California—Art. XI, § 11 (1849); Indiana—Art. IV, § 24 (1851); Kentucky—Art. VIII, § 6 (1850); Pennsylvania—Art. IX, § 11 (1838); South Carolina—Art. XIV, § 4 (1868); Tennessee—Art. I, § 17 (1870). A few states even prohibited by their constitutions, any suits against the state. *See* Alabama—Art. I, § 15 (1875); Illinois—Art. IV, § 26 (1870); West Virginia—Art. VI, § 35 (1845).

> It is an established principle of jurisprudence in all civilized nations that *the sovereign cannot be sued in its own courts, or in any other, without its consent and permission;* but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state. (Emphasis added).

Beers v. Arkansas, 61 U.S. 991, 992 (1858).

Thus, by 1871, it was generally accepted that states could not be sued in federal or state court without their consent.[10] The Eleventh Amendment and more importantly, the common law doctrine of state sovereign immunity barred such suits, with the exception of those suits expressly authorized by the Constitution, *i.e.* states against states. Moreover, until Reconstruction, Congress had yet to enact any legislation granting jurisdiction to federal courts to hear cases involving federal questions, much less any explicit authority to entertain actions against states or their officers. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 290 (Brennan, J., dissenting). The enactment of § 1983 authorized federal courts to hear civil cases involving deprivation of constitutional rights; however, since states could not be sued in either state or federal court because of state sovereign immunity and the Eleventh Amendment, it is difficult to conceive that Congress intended to abrogate the sovereign immunity of states—

[10] It must also be remembered that the fiction of a "state official in his/her official capacity" was not judicially recognized until 1908 by this Court in *Ex Parte Young,* 209 U.S. 123 (1908); therefore, a suit against a state official in 1871 had no effect on a state's sovereign immunity.

either common law or Eleventh Amendment—by the use of the ambiguous term "person".[11]

Secondly, amici states contend that oral testimony of congressmen during legislative debates, unless very precisely directed to the intended meaning of particular words, are of little value in determining the meaning of those words. None of the legislators' statements cited by the petitioner in his brief provide any aid at all in determining whether Congress intended states to fall within the definition of "person" under § 1 of the Civil Rights Act of 1871. In fact, most of the cited statements in the petitioner's brief relate to arguments made by congressmen regarding the authority of Congress to enact §§ 2 through 6 of the Civil Rights Act of 1871. The lack of testimony regarding § 1 could not be a basis for relying upon testimony of other sections in the Act in attempting to determine the meaning of the term "person" in § 1.

The petitioner also claims that since "Congress considered a state to be a corporation, it understood that remedies against state officers implicated the state." Petitioner's Brief, p. 17. This argument relies on general

[11] Of course, this Court's decision in *Hans v. Louisiana,* 134 U.S. 1 (1890), clearly established the Eleventh Amendment as a bar to actions against states in federal court. Even though the language of the Eleventh Amendment technically only reversed the *Chisholm* decision, the *Hans* Court was correct in concluding that "can we suppose that when the Eleventh Amendment was adopted, it was understood to be left open for citizens of the state to sue their own state in federal courts while the idea of suits by citizens of other courts or of foreign states was indignantly repelled?" *Id.* at 15. It is arguable that instead of broadening the 11th Amendment, *Hans* in fact recognized the applicability of the common law doctrine of state sovereign immunity to federal courts. *See Hans v. Louisiana,* 134 U.S.

(Continued on following page)

statements of individual legislators which are not controlling as to legislative intent. Moreover, amici states would assert that it was well established early in this country's history that states were generally not considered corporations. In his dissent in *Chisholm*, Justice Iredell stated the following:

> The differences between such corporations, and the several States in the Union, as relative to the general Government, are very obvious in the following particulars. 1st. A corporation is a mere creature of the King, or of Parliament. It owes its existence, its name, and its laws, to the authority which create it. A State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: The voluntary and deliberate choice of the people. 2d. A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless in the special instances were the general Government has power derived from the Constitution itself. 3d. A corporation is altogether dependant (sic) on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The people of the State created, the

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at 21 (Harlan, J., concurring) (Suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends, unless the state itself consents to be sued.)

> people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the republican form.

Chisholm v. Georgia, 2 Dall. at 446.

The debates of the 42nd Congress are of little aid in determining the meaning of the term "person". However, when the Civil Rights Act of 1871 is placed in its historical context, the answer becomes apparent. Congress vested exclusive jurisdiction of § 1 with the federal courts due to the inability of state courts to act in the face of the lawlessness instigated by the Ku Klux Klan in the South. There was no clearly expressed intention by Congress that § 1 apply to the states, meaning that sovereign immunity was not abrogated. Thus, since it was impossible to obtain relief against the state, it is doubtful that Congress intended for § 1 to apply to states without any remedy.[12]

II. THIS COURT'S DECISIONS SUPPORT THE CONCLUSION THAT A STATE OR ITS OFFICERS ACTING IN THEIR OFFICIAL CAPACITY WERE NOT INTENDED BY THE 42ND CONGRESS TO BE PERSONS UNDER 42 U.S.C. § 1983.

In analyzing this Court's decisions subsequent to the enactment of the Civil Rights Act of 1871, it is the position of the amici states that these decisions support the view that Congress did not intend the term "person" to include a state or its officers acting in their official capacity. As

[12] Amici states agree that § 5 of the Fourteenth Amendment authorized Congress to abrogate state sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). However, amici states contend that § 1 does not abrogate such immunity. *Cf., Quern v. Jordan*, 440 U.S. 332 (1979).

has already been discussed, the definitional issue of the term "person" is inextricably intertwined with state sovereign immunity and the Eleventh Amendment. At the time of the enactment of the Civil Rights Act of 1871, states could not be sued without their consent in any court under the common law doctrine of state sovereign immunity and the Eleventh Amendment. Subsequent decisions of this Court support the conclusion that Congress did not intend to expressly abrogate Eleventh Amendment immunity or state common law sovereign immunity for that matter.[13]

In *Quern v. Jordan*, 440 U.S. 332 (1979), Chief Justice Rehnquist writing for the majority[14] stated the following:

> We are simply unwilling to believe, on the basis of such slender 'evidence' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the states.

Id. at 342. See also *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974).

The petitioner argues that the standard for determining whether the state is a "person" under § 1983 is different and lesser than the requirement that abrogation of the Eleventh Amendment must be clearly expressed in the statute. Based upon this argument, the petitioner concludes that "deciding that a state is a person under § 1983

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[13] The principle that Eleventh Amendment immunity must be expressly abrogated was most recently restated by this Court in *Welch v. Texas Dep't. of Highways*, 107 S.Ct. 2941, 2945-46 (1987).

[14] Chief Justice Rehnquist's statement was in response to Justice Brennen's argument that this Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974) that § 1983 does not abrogate the state's Eleventh Amendment immunity "is most likely incorrect." *Id.* at 340.

in no way affects its Eleventh Amendment immunity or the validity of this Court's decision *Quern v. Jordan*". Petitioner's Brief, p. 36.

This argument ignores the fact that the Eleventh Amendment and state sovereign immunity are intertwined with the definitional issue of "person" under § 1983. Since Congress did not intend to expressly abrogate the Eleventh Amendment by the enactment of § 1 of the Civil Rights Act of 1871, then it follows that it also did not intend to abrogate any common law state sovereign immunity in state court at the time of the enactment in 1871. It must be remembered that in 1871, states could not be sued in any court without their consent unless there was an express constitutional or congressional abrogation of state sovereign immunity. Moreover, amici states have been unable to find any state laws at the time of the enactment of the Civil Rights Act of 1871 that consented for a state to be sued for any similar cause of action. Why would Congress have intended states or their officers to be considered "persons" if no remedy could be obtained in either federal or state court?

Although this Court in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) held that municipalities were persons for purposes of § 1983, that conclusion does not support petitioner's contention that states or their officers were also intended to be "persons" under 42 U.S.C. § 1983.[15] Much of Justice Brennan's majority opinion in

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[15] Petitioner argues that in *Monell* this Court held that, absent a clear statement that § 1983 should not apply to municipal corporations, then there was no justification for excluding them. Petitioner then cites a number of other decisions of this Court for the proposition that such a principle also applies to states.

(Continued on following page)

Monell focuses upon the Sherman amendments to the Civil Rights Act of 1871 as related to municipalities. In particular, Justice Brennan, in overruling *Monroe v. Pape,* 365 U.S. 167 (1961) made an in-depth review and analysis of the Sherman amendments.

The Sherman amendments would have held a municipal corporation liable for damage done to the person or property of its inhabitants by private persons who rioted. Cong. Globe, 749 (1871). By rejection of these amendments, the Court in *Monroe* concluded that Congress had decided that it had "no constitutional power to impose any

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Petitioner's Brief, pp. 23-24. Such analysis ignores two points. First, the circumstances surrounding the enactment of § 1 of the Civil Rights Act of 1871 indicate that the 42nd Congress did *not* intend for states or their officers to be covered. *See, supra,* pp. 7-14. Second, the cases cited by the petitioner involve circumstances where a state engages in an activity regulated by Congress pursuant to express constitutional authority. *U.S. v. California,* 297 U.S. 175, 185 (1936) (California, by engaging in interstate commerce by rail has subjected itself to the commerce power); *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278-79 (1959) (By entering into a compact to sue and be sued; joint commission of Tennessee and Missouri subjected itself to suit); *California v. Taylor,* 353 U.S. 553, 568 (1957) (Again California engaging in interstate commerce); *Parden v. Terminal Railway of Alabama,* 377 U.S. 184, 193 (1964) (By operating a railroad, Alabama came under the Federal Employer's Liability Act). In each of these cases, the state engaged in an activity regulated by Congress, pursuant to express constitutional authority and, thereby, waived any sovereign immunity. On the other hand, the present case does not involve a federal regulatory scheme over a legitimate activity, *i.e.* operation of a railroad as it affects interstate commerce, in which a state may or may not engage; rather, Congress, under § 1983 prohibits certain conduct which deprives persons of their constitutional rights by permitting the victim to bring suit against the person who did such harm. There is no legitimate conduct in which a state could engage in order to bring it under the purview of the Civil Rights Act. Thus, these cases are inapplicable.

obligation upon county and town organizations, the mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. at 190. Justice Brennan refutes this view in *Monell* by showing that Congress' rejection of the Sherman amendments had no effect upon § 1 of the Civil Rights Act of 1871; therefore, the conclusion of the court in *Monroe* was incorrect.

The petitioner's attempt to apply the debates of the Sherman amendments to the question of whether Congress intended states to be persons under § 1 of the Civil Rights Act of 1871, ignores the fact that states, unlike municipalities, are clothed with Eleventh Amendment immunity. Without such immunity, § 1 of the Civil Rights Act of 1871 can be applied to municipalities without the necessity of express abrogation of the Eleventh Amendment. On the other hand, in the absence of express abrogation of Eleventh Amendment or state common law sovereign immunity by Congress, no remedy was available against the State or its officers in 1871. Thus, the debates of the Sherman amendments are of little help on this issue.

Application of the prospective compliance exception in *Ex parte Young,* 209 U.S. 123 (1908) to § 1983 cases involving injunctive relief against state officials in their official capacity[16] does not mean that state officers acting in their official capacity are "persons" under § 1983. In *Ex parte Young,* this Court created a judicial exception to

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[16] In *Hutto v. Finney,* 437 U.S. 678 (1979), this Court stated that "although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities." *Id.* at 690.

the doctrine of sovereign immunity where prospective injunctive relief was to be afforded against a state official to compel him to comply with the Constitution. In particular, this Court stated the following:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. at 159.

Thus although suits requesting prospective injunctive relief may be brought against state officials, such suits in reality are not suits against the state but suits to compel that an official conform his or her conduct to the constitution. *Ex Parte Young* also created a legal fiction in which the state official was enjoined in his or her official capacity in order to ensure compliance with the order by that particular individual's successors. However, this Court was careful in *Ex Parte Young* to note that such an action would not offend the sovereignty of the state. *Id.* In any event, this judicially created legal fiction was not in existence in 1871; therefore, its application to § 1983 cases must be done with the recognition that such equity suits are not in reality against the state but against the individual.

This Court has also indicated in *Ford Motor Co. v. Indiana Dept. of Treasury*, 323 U.S. 459 (1945) that when a lawsuit is "in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464[17] Thus, a suit against a state official for money damages which seeks funds from the state treasury is, a suit against the state. If the 42nd Congress did not intend states to be persons under § 1 of the Civil Rights Act of 1871, in light of the Eleventh Amendment and common law doctrine of sovereign immunity, then the same conclusions would apply to actions for money damages against state officials which seek funds from a state treasury.

CONCLUSION

Based upon the foregoing authorities and analysis, the amici states urge this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

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[17] More recently, this Court reaffirmed this principle in *Kentucky v. Graham*, 474 U.S. 170 (1985) (Attorneys cannot recover § 1983 fees against the state where settlement was reached against the Kentucky State Police Commissioner because the settlement was against him in his individual capacity, not official capacity, which is barred by the Eleventh Amendment).

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On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, MICHIGAN LEGAL SERVICES, AND CENTER FOR CONSTITUTIONAL RIGHTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The resolution of this case will have a significant impact upon the extent to which those who are injured by the unconstitutional actions of states and state officials

[1] The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 32.2. A description of *amicus* organizations and a statement of their interests appear in the Appendix hereto.

can secure complete relief. Plaintiffs' ability to name states as defendants in state court actions and to seek appropriate relief from states where their policies have infringed on federal rights is important both to permitting effective litigation and to achieving *Amici*'s broader purpose of deterring unlawful state conduct.

SUMMARY OF ARGUMENT

In resolving the important issue of statutory interpretation presented by this case, the Court must look to evidence of the congressional intent in enacting 42 U.S.C. § 1983. First, the legislative history demonstrates that Congress intended Section 1983 to provide a comprehensive civil remedy that would protect against the full range of conduct prohibited by the Fourteenth Amendment. Because the substantive protections of the Fourteenth Amendment are directed specifically against the states and state conduct, the remedial provisions of Section 1983 created to enforce those protections by necessity also must be directed against the states. That conclusion is supported further by the larger historical context in which Congress enacted Section 1983, a context which makes clear that Congress intended Section 1983 to be part of a constitutional and statutory scheme mandating respect for federal civil rights both by states as well as by individuals.

Second, Section 1983 must be interpreted consistent with the broad remedial purposes it was enacted to achieve. Congress clearly intended Section 1983 to serve the dual purposes of providing just compensation to the victims of federal rights violations and deterring such violations in the future. Unless this Court reverses the decision below and holds that states are "persons" answerable for their own misconduct under Section 1983, the dual purposes of the statute will be undermined and the protection of federal rights will be left unsecured.

ARGUMENT

I. THE LEGISLATIVE HISTORY AND HISTORICAL CONTEXT OF THE CIVIL RIGHTS ACT OF 1871 DEMONSTRATE THAT THE 42D CONGRESS INTENDED STATES AND STATE OFFICIALS TO BE INCLUDED WITHIN THE MEANING OF "PERSON" UNDER SECTION 1983.

The Michigan Supreme Court misunderstood the question presented by this case. In holding that states and state officials [2] are not "persons" within the meaning of Section 1983, the Michigan Supreme Court confused the definitional question of the scope of Section 1983 with the Eleventh Amendment jurisdictional issue whether *federal* courts are barred from presiding over Section 1983 actions in which states are named defendants.[3] To answer the definitional question presented here, this Court should focus on the history and purpose of Section 1983, not on Eleventh Amendment jurisdictional consid-

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[2] Because a suit against a state agency or a state official in his official capacity is for all practical purposes a suit against the state itself, any reference in this brief to the state as a proper "person" defendant under Section 1983, unless otherwise indicated, includes state agencies and state officials acting in their official capacities. *See Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) (state officials); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) (state agency).

[3] The source of this confusion is the Michigan Supreme Court's reliance on this Court's decision in *Quern* v. *Jordan*, 440 U.S. 332 (1979). In *Quern*, the Court affirmed the holding of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), that Section 1983 did not remove the Eleventh Amendment bar to actions against states in federal court. 440 U.S. at 341. The Eleventh Amendment concerns at issue in *Quern*, however, are irrelevant in state court actions such as this one. Indeed, as the court below itself at one point acknowledged: "*Quern* . . . left without a definite answer the question whether it intended the term 'person' to include states for purposes of Section 1983 actions in state courts in which the Eleventh Amendment would not apply . . . ." *Smith* v. *Department of Public Health*, 428 Mich. 540, 571, 410 N.W.2d 749, 763 (1987).

erations that are wholly inapplicable to an action brought in *state* court.[4]

This Court recognized the distinct nature of those statutory interpretation and Eleventh Amendment questions in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). There the Court determined that municipalities were "persons" under Section 1983 by examining the legislative history of the Civil Rights Act of 1871 ("the 1871 Act"),[5] Section 1 of which became 42 U.S.C. § 1983 (1979) ("Section 1983"). *Id.* at 690 n.55.[6] That same legislative history demonstrates that the 42d Congress also intended states to be "persons" within the meaning of Section 1983. In light of Congress' intent to provide a broad compensatory and deterrent remedy for violations of federally protected rights under color of state law, any other interpretation of "person" would seriously undermine the objectives of the statute.

A. The legislative history of the 1871 Act demonstrates that Congress intended to exercise its full power under Section 5 of the Fourteenth Amendment to provide a broad civil remedy against states for deprivations of federal rights.

1. Congress' intent to include states and state officials within the definition of "person" under Section 1983 is evident from the debates on the 1871 Act.

Section 1983 provides a cause of action against "every person" who deprives another of a federal constitutional

[4] *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, when an action is brought in a state court since the Amendment by its terms restrains only '[t]he judicial power of the United States.'").

[5] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

[6] As in the instant case, Eleventh Amendment considerations were not relevant to the Court's decision in *Monell*. *See Monell*, 436 U.S. at 690 n.54. (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890)).

or statutory right under color of state law.[7] The 1871 Act, introduced in the House on March 28, 1871 as H.R. 320, was entitled "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes" ("the Bill").[8] Representative Shellabarger, author of H.R. 320, and its manager in the House, opened the debates on the Bill with a speech on its scope. He explained that because the Bill was enacted to enforce the provisions of the Fourteenth Amendment, which were directed at the states,[9] the Bill authorized a remedy against the states for violations of the Amendment's prohibitions. *See* Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871). Otherwise, he recognized, the protections of the Fourteenth Amendment would be "a miserable waste of words":

> If, after all this transcendent profusion of enactment *in restraint of the States* and affirmative conferment of power on Congress, *the States still remained unrestrained*, . . . then not only is the profusion of

[7] The 1871 Act contained six sections. Section 1, as reenacted in 1874 and subsequently codified in 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1979) (emphasis added).

[8] Cong. Globe, 42d Cong., 1st Sess. 317 (1871). The 1871 Act was one of a series of acts directed primarily at halting the increasing violence in the South against recently emancipated slaves. *See* discussion of historical context *infra* at I.B.

[9] The language of the Fourteenth Amendment is specifically directed to the states: "No State shall . . . ." U.S. Const. amend. XIV, § 1. *See, e.g., Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *The Civil Rights Cases*, 109 U.S. 3, 9 (1883). For further discussion of the purposes of the Fourteenth Amendment, *see* note 35 *infra*.

> guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

Id. (emphasis added).[10]

There was little congressional debate on Section 1 of the 1871 Act. The court below assumed that the lack of objections from congressmen concerned about state sovereignty indicated that the 42d Congress could not have intended Section 1983 to encompass states and state officials. That attempted reading of congressional silence is unfounded and ignores the context surrounding the discussions on Section 1983. Given that the other sections of the 1871 Act and the previously enacted Civil Rights Act of 1866 ("the 1866 Act")[11] imposed penalties on the states more severe than the civil remedy suggested by Section 1 of the 1871 Act, Congress already had resolved itself to imposing obligations directly upon the states.[12] When compared to the remedies authorized by

[10] *See also* Cong. Globe, 42d Cong., 1st Sess. 367-368 (1871) (Rep. Sheldon) ("[T]hese amendments [Thirteenth, Fourteenth and Fifteenth] enlarge the power of the Government *in controlling the action of the States*, and I believe that it can extend its powers, through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities.") (emphasis added).

[11] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

[12] The other sections of the 1871 Act imposed against the states measures considered more stringent than simple money judgments. For example, Section 2 imposed federal civil and criminal liability on conspiracies within the states to catch state inhabitants who were escaping conviction in state courts; Section 3 authorized the President to call in federal troops to take over state functions; the Sherman Amendment, proposed as Section 7, raised the possibility of imposing vicarious liability on local governments for damages caused by mob violence. Furthermore, many members of the 42d Congress had passed the Civil Rights Act of 1866 only five years earlier, imposing criminal liability on state officials without regard to whether they were exercising state power in good faith reliance

other provisions, the "mild remedy"[13] of Section 1 did not warrant extended debate over its potential effects on the states. As Senator Edmunds, the manager of the Bill in the Senate, noted, Section 1 was "so very simple" because it was "really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess. 569 (1871).

In contrast, Congress extensively debated the proposed Sherman Amendment to the 1871 Act, which would have imposed liability for money damages on local governments for failing to enforce laws against private misconduct and violence toward blacks. Debates over that amendment reveal Congress' general willingness to impose liability on the states. The opponents of the Sherman Amendment thought it was unfair to impose policing obligations upon municipalities, which only had police powers to the extent given them by the states.[14] As Representative Willard, a Republican opposed to the Sherman Amendment, but in favor of the 1871 Act, explained, if anyone should be held liable for failing to control private misconduct, it should be the states:

> I hold that this *duty of protection*, if it rests anywhere, *rests in the State*, and that *if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought*

on state law—a severe measure intent on crippling state governments that were violating constitutional rights by deterring individuals from enforcing unconstitutional laws. *See* 17 Stat. 13; Zagrans, *Under Color of* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 543-547 (1985).

[13] Cong. Globe, 42d Cong., 1st Sess. 482 (1871) (Rep. Wilson).

[14] As the Court recognized in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), objections to the Sherman Amendment were motivated not by concerns with imposing monetary liability on the municipalities for their own misconduct, but instead by the unfairness of requiring municipalities to be insurers for all harm caused by discriminatory conduct within their boundaries. *See Monell*, 436 U.S. at 674 n.30; *id.* at 706 (Powell, J., concurring); *Note, Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan*, 62 B.U.L. Rev. 731, 737 (1982).

> *home to the State.* Hence, in my judgment this section [the proposed Sherman Amendment] would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, *suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.*

Cong. Globe, 42d Cong., 1st Sess. 791 (1871) (emphasis added).

Moreover, contrary to the opinion below, there is no reason to believe that Congress did not contemplate suits against states when it enacted the 1871 Act. The 42d Congress undoubtedly knew that a state could be subject to suit in federal court if it waived its Eleventh Amendment immunity,[15] or in state court, where the Eleventh Amendment is inapplicable.[16] Congress also knew that Section 1983 actions could be brought in state court because the state courts possessed "concurrent power to enforce the Constitution of the United States within their respective limits. . . ." *Patsy* v. *Board of Regents*, 457

[15] The concept of waiver of Eleventh Amendment immunity would have been known to the 42d Congress. Waiver of immunity was discussed in opinions of this Court long before 1871. *See Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 442 (1793) ("[I]f the Prince gives the subject leave to enter an action against him . . . in his own Courts . . . ."). And various forms of waiver existed at the time. *See, e.g., Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) (entering a general appearance constitutes waiver); *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907-908 (1824) (giving state bank capacity to sue and be sued constitutes waiver). Indeed, waiver of Eleventh Amendment immunity would have been much easier in 1871 than it is now. *Compare Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) (despite the Eleventh Amendment, state's "appearance in a court of the United States would be a voluntary submission to its jurisdiction"), *with Edelman* v. *Jordan*, 415 U.S. 651 (1974) (state allowed to raise Eleventh Amendment defense for first time in court of appeals).

[16] *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

U.S. 496, 507 (1982) (*quoting* Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871)).[17]

In enacting the Civil Rights Acts, "Congress . . . articulated a theory of national citizenship and federally enforceable rights that assumed concurrent responsibility and authority . . . to enforce and protect the civil rights of Americans." [18] Congress was adding to the jurisdic-

[17] *See also* Cong. Globe, 42d Cong., 1st Sess. 661 (1871) (Sen. Vickers). Concurrent jurisdiction over Section 1983 actions has been recognized by this Court. *Martinez* v. *California*, 444 U.S. 277, 283-284 n.7 (1980) (Congress not barred from requiring state courts to entertain Section 1983 actions); *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980) ("Any doubt that state courts may also entertain . . . [Section 1983] actions was dispelled by *Martinez* v. *California*"); *see Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (Court relied heavily on availability of state court Section 1983 action to support exclusion of certain Section 1983 damage actions from federal court). Evidence of Section 1983 actions in state courts prior to 1969 is sparse, however. *See* Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 393 n.52. (1984).

[18] R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights*, 1866-1876, p. 3 (1985). *See* Cong. Globe, 42d Cong., 1st Sess. 429 (1871) (Rep. McHenry) ("[A]s a question of policy. . . . it is manifestly to the best interests of the people that the State, through her courts, should enforce the privileges and immunities guarantied [sic] by this section. The Federal Government has but two or three courts in any state, and in some only one. The contests among citizens under this provision will be numerous, and it is a tyranny to drag people hundreds of miles from their homes to have their cases tried before courts . . . where the facts will be determined by a jury of the vicinage."). *See also Patsy* v. *Board of Regents*, 457 U.S. 496, 507 (1982) (citing Cong. Globe, 42d Cong., 1st Sess. App. 216 (1871) (Sen. Thurman, member of Senate Judiciary Committee) (Congress intended to provide dual or concurrent forums in the state and federal courts to enable a plaintiff to choose her forum)); Note, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1150 (1977) ("the prevailing assumption [at the time that the 1871 Act was passed] had been that the state courts were the appropriate forum for the enforcement of federal law."); Hart & Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 844-845 (2d

tion of the federal courts not subtracting from that of the state courts. *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

This Court implicitly, if not explicitly, already has recognized that the 42d Congress intended states and state officials to be "persons" under Section 1983. Various members of this Court have stated that Section 1983 actions may be brought against states or state officers.[19] In addition, this Court has entertained and approved relief in numerous Section 1983 cases against public officials in their official capacities,[20] and against states,[21] without dismissing the suits for failure to state a claim under

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ed. 1973) ("Although the protection of federally granted rights was a primary purpose for the establishment of a system of federal courts, the principle established by the first Judiciary Act was that private litigants must look to the state tribunal in the first instance for vindication of federal claims.").

[19] *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1, 22 n.10 (1980) (Powell, J. dissenting) ("Section 1983 actions may be brought against states, municipalities and other subdivisions, officers, and employees . . . ."); *Monell*, 436 U.S. at 682 ("Section 1 without question could be used to obtain a damages judgment against *state* or municipal *officials* who violated federal constitutional rights while acting under color of law.") (emphasis added) (citing Cong. Globe, 42d Cong., 1st Sess. 334 (1871) (Rep. Hoar); *id.* at 365 (Rep. Arthur); *id.* at 367-368 (Rep. Sheldon); *id.* at 385 (Rep. Lewis); *id.* at App. 217 (Sen. Thurman)); *id.* at 700 ("[E]veryone—proponents and opponents alike—knew § 1983 would be applied to state officers and nonetheless stated that Section 1983 was constitutional.").

[20] *See, e.g., Alabama* v. *Pugh*, 438 U.S. 781 (1978) (Court ordered dismissal of state from action on Eleventh Amendment grounds but allowed lower court's mandatory injunction to stand against state officials); *Vlandis* v. *Kline*, 412 U.S. 441, 444-445, 454 (1973) (Court affirmed an order in a Section 1983 action directing a public official to reimburse excess tuition payments that had been improperly collected from students); *Griffin* v. *School Bd.*, 377 U.S. 218, 233 (1964) (Court authorized issuance of an order requiring public officials to exercise their power to levy taxes to raise funds, if necessary, to reopen the public schools).

[21] *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1 (1980); *Martinez* v. *California*, 444 U.S. 277 (1980).

Section 1983. *See Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-307 (1962) ("Too many important decisions of this Court have proceeded on the premise that public officials in their official capacities are 'persons' under Section 1983 for the question to be considered other than settled."). The same reasoning applies equally to state defendants.

2. *The legislative history also demonstrates the 42d Congress' intent to exercise its full Fourteenth Amendment power to provide a complete remedy for deprivations of the rights protected by that Amendment.*

The remedy available under Section 1983 was intended to be broad enough to fulfill the purpose of the 1871 Act to enforce the prohibitions of the Fourteenth Amendment. "[T]here can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell*, 436 U.S. at 700. As Representative Wilson proclaimed:

> By the fifth section of the fourteenth article Congress has power to enforce the provisions of the article by appropriate legislation. Now, I ask, what legislation could be more appropriate than to give to a person injured by another under color of such unconstitutional State laws a remedy by civil action? . . . . [T]here are certain rights, privileges, and immunities . . . Congress may enforce by legislation; and it is proposed to enforce them by this Bill . . . .

Cong. Globe, 42d Cong., 1st Sess. 482 (1871). Because the prohibitions of the Fourteenth Amendment were directed at the states, logic dictates that the 42d Congress intended that the statute designed to enforce fully the Amendment reach the states as well.

The plain language of Section 1983 demonstrates the breadth of relief that Congress intended to make available under Section 1983. The statute creates a cause of

action for "redress" by the "party injured" against "every person" who violates federal rights and provides for the broadest possible relief through "an action at law, suit in equity, or other proper proceeding." Nowhere in the statute did Congress indicate that the "party injured" should go without "redress" when the wrongdoing "person" is a state or state agency and the relief sought is monetary. If Congress had intended to exclude states from the operation of Section 1983, it easily could have prohibited all awards against individuals or entities that impact upon the state and its treasury.[22]

The legislative history of the 1871 Act further demonstrates that Congress intended to provide a broad remedy, reaching at least those types of state conduct proscribed by the Fourteenth Amendment. Congress passed the 1871 Act to address the acts of racial violence rampant at the time:

> [W]hen violence and lawlessness are universally prevalent, the denial of equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to section five [of the Fourteenth Amendment] . . . . *The authority thus conferred is subject to no restrictions or limitations.*

Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (Rep. Stoughton) (emphasis added).

In opening the debate on the 1871 Act, Representative Shellabarger emphasized the broad scope of Section 1:

[22] This Court has recognized the broad reach of Section 1983 by entertaining actions thereunder against state officials in their official capacities and allowing relief. *See* note 20 *supra*. In federal courts, remedies in such cases have been limited to prospective injunctive relief because of Eleventh Amendment concerns. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908). Again, however, those jurisdictional limitations are not inherent in the Section 1983 cause of action and do not apply to this Section 1983 action brought in *state* court. *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

> This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . [and] *the largest latitude consistent with such words employed* is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. *These provisions of the Fourteenth Amendment are wholly devoted to securing the equality and safety of all the people, as is this Section [Section 1], and, indeed the entire bill.*

Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (*quoted with approval in Monell*, 436 U.S. at 684) (emphasis added). *See also* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). Representative Dawes similarly commented on the broad reach of the Bill:

> No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty and pursuit of happiness of every citizen of this Republic.

Cong. Globe, 42d Cong., 1st Sess. 475 (1871). Senator Thurman, leader of the opposition in the Senate, was most concerned that: "[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Cong. Globe, 42d Cong., 1st Sess. App. 217 (1871).

B. The historical context of the 1871 Act also demonstrates that Congress intended to provide a direct and comprehensive remedy against state violations of the Act's provisions.

The 1871 Act was one in a series of enactments, including the 1866 Act, the Fourteenth Amendment, and the Enforcement Act of 1870 (the "1870 Act"),[23] passed by Congress to protect individual rights in the wake of

[23] Act of May 31, 1870, ch. 114, 16 Stat. 140.

post-Civil War violence. Section 1983 was part of a constitutional and statutory scheme intended to enforce both state and individual respect for federal civil rights and to prevent constitutional guarantees of liberty and equality from being reduced to unenforceable promises that were rights in name only.[24]

1. *The 1866 Act, Section 2 of which served as the model for Section 1983, was intended to provide a broad remedy against states as well as individuals.*

The 1866 Act[25] was passed primarily in response to state-enacted Black Codes that left "[t]he Negro . . . a slave in all but the constitutional sense."[26] It provided, *inter alia*, for the criminal prosecution of persons, including judges and other state officials, who violated the civil rights of others, and authorized the President to take actions "necessary to prevent the violation and enforce the due execution of this act." The Act was directed at

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[24] In the aftermath of the Civil War, Congress passed three constitutional amendments and a series of civil rights statutes designed to outlaw slavery and prohibit any infringement of the civil rights of former slaves. The Thirteenth Amendment, ratified in 1865, abolished slavery; the Fourteenth Amendment, ratified in 1868, prohibited states from depriving citizens of due process and equal protection under the laws; the Fifteenth Amendment, ratified in 1870, guaranteed suffrage to the emancipated slaves. *See* U.S. Const., amends. XIII, XIV, XV.

[25] The 1866 Act contained ten sections. Section 2, which served as the model for Section 1 of the 1871 Act, provided:

> That any *person* who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, . . . shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the Court.

Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).

[26] Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1325 (1952).

states as well as individuals.[27] That one of the objectives of Section 2 of the 1866 Act was to reach the states is clear from the legislative history,[28] and the enforcement of the statute.

Although limited by the nature of the remedy to the criminal prosecution of individuals, Section 2 of the 1866 Act was designed to dismantle the *state* enforcement mechanism being used to prolong the enslavement of blacks. The sanctions of Section 2 were applied repeatedly to state judges and other officials for actions taken in their official capacities pursuant to clear state law commands. That good faith immunity was not a defense to these prosecutions demonstrates that the remedy was a severe one directed at the state through its individual officials.[29] Congress found criminal sanctions to be the

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[27] Section 1 afforded "citizens of every race and color the right to make and enforce contracts, convey real and personal property," and other transactions specifically directed at individuals. 14 Stat. 27 § 1. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968) ("[C]ongress had before it [when debating the 1866 statute] an imposing body of evidence pointing to the mistreatment of negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation."). The legislative history of the Act forcefully demonstrates an intent to deter civil rights violations by *all* persons, including states. *See* Cong. Globe, 42d Cong., 1st Sess. App. 85-86 (1871) (Rep. Shellabarger), *quoted with approval* in *Quern* v. *Jordan*, 440 U.S. 332, 362 (1979) (Brennan, J., concurring).

[28] "[*The bill's*] *whole force is expended in defeating an attempt, under State laws*, to deprive races and the members thereof as such of the rights enumerated in this Act. This is the whole of it." Cong. Globe, 39th Cong., 1st Sess. 1293-1294 (1866) (Rep. Shellabarger) (emphasis added).

[29] "It cannot be claimed that the persons . . . could not be punished under the provisions of this bill because they were acting as officers and their conduct was the result of errors of judgment only. That would be no valid defense—no defense at all—against the positive terms of this law." Cong. Globe, 39th Cong., 1st Sess. 1271 (1866) (Rep. Kerr). *See Zagrans supra* note 12 at 543, 545. That Section 2 authorized the incarceration of judges demonstrates the severity of the remedy intended. *See* Cong. Globe, 39th Cong., 1st

most effective method at the time to thwart the enforcement of discriminatory state laws and to deter future discriminatory legislation. Senator Trumbull, sponsor of the Bill, felt that a comprehensive remedy would quickly put an end to the discrimination occurring throughout the nation.[30] Section 1983 was modeled after Section 2 of the 1866 Act to bring the full force of congressional power to bear upon individuals and states.[31]

In 1870, two months after ratification of the Fifteenth Amendment, Congress reenacted the 1866 Act in the 1870 Act.[32] The 1870 Act retained the severe criminal sanctions of the 1866 Act and added provisions to prohibit interference with the exercise of voting rights.[33] Congress

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Sess. 475, 1154, 1156, 1265 (1866) (Reps. Eldridge and Davis, opponents of the Bill).

[30] "When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).

[31] As Senator Edmunds, the manager of the Bill in the Senate, stated: "[T]he first section is one . . . defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights Bill [of 1866], which have since become a part of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 568 (1871). *See also* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger), *quoted with approval in Quern* v. *Jordan*, 440 U.S. 332, 362 (1979) (Brennan, J., concurring).

[32] Section 18 of the 1870 Act expressly reenacted the 1866 Act. *See* 16 Stat. 144, § 18. Section 2 of the 1866 Act was reenacted as Section 17 of the 1870 Act. The 1870 Act adopted the language of Section 2 of the 1866 Act almost in its entirety, though Congress slightly modified the language to include a broader class of violations. *Compare* 16 Stat. 144, § 17 *with* 14 Stat. 27, § 2.

[33] This Court, in *United States* v. *Price*, 383 U.S. 787 (1966), explained the purpose and scope of the 1870 Act:

> The purpose and scope of the . . . 1870 enactment must be viewed against the events and passions of the time . . . . The

intended both the 1866 and 1870 Acts to provide a broad remedy that would reach the states as well as individuals.[34]

2. *The Fourteenth Amendment, passed to provide a constitutional basis for the 1866 Act, was clearly directed at the states.*

The Fourteenth Amendment was ratified in 1868. The language of the amendment and its legislative history demonstrate that the drafters of the Fourteenth Amendment intended to reach the states.[35] The overriding pur-

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Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man. 383 U.S. at 803-804.

[34] "[I]t is better to invade the judicial power *of the State* than permit it to invade, strike down, and destroy the civil rights of the citizens . . . ." Cong. Globe, 39th Cong., 1st Sess. 1837 (1866) (Rep. Lawrence in support of the 1866 Act) (emphasis added).

[35] Representative Bingham, author of Section 1 of the Fourteenth Amendment, told his colleagues during the 1871 debate that he had used the "no state shall" formulation for the precise purpose of overruling the Supreme Court's decision in *Barron* v. *Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). He explained, "[T]he city had taken private property for public use without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States." Cong. Globe, 39th Cong., 1st Sess. App. 84 (1866). *See Ex parte Virginia*, 100 U.S. 339, 346-347 (1880) (The prohibitions of the Fourteenth Amendment "are directed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken."); *The Civil Rights Cases*, 109 U.S. 3, 9 (1883) (The "abrogation and denial of rights, for which the States alone were or could be responsible was the great seminal and fundamental wrong which was intended to be remedied [by the Fourteenth Amendment]").

pose of the amendment was to enable Congress effectively to reach the states to guarantee civil rights for all citizens. As stated by Representative Wilson, Chairman of the Judiciary Committee, "[T]his bill *invades the States to enforce equality* of rights in respect to those things which properly and rightfully depend on State regulations and laws." Cong. Globe, 39th Cong., 1st Sess. 1294-1295 (1866) (emphasis added).

The Fourteenth Amendment also was intended to provide a constitutional basis for the civil rights statutes.[36] Congress intended to place responsibility for respecting civil rights directly on the states under the Constitution, despite the fact that the 1866 Act directed at states and individuals already existed. As stated by Representative John Broomall: "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Cong. Globe, 39th Cong., 1st Sess. 2498 (1866).

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[36] During the debate on the 1866 Act, Representative John Bingham opposed the Bill because he felt that Congress had no power to pass such a provision without a constitutional amendment. In proposing a draft of the Fourteenth Amendment, he clearly stated an intent to reach the same misconduct that Section 2 of the 1866 Act prohibited:

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, *to punish officials of States for violation of the oaths enjoined upon them by their Constitution?*

Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (emphasis added).

II. INCLUDING STATES WITHIN THE DEFINITION OF "PERSON" UNDER SECTION 1983 FULFILLS THE PURPOSE OF THE 42D CONGRESS TO REMEDY DEPRIVATIONS OF FEDERAL RIGHTS UNDER COLOR OF STATE LAW THROUGH ADEQUATE COMPENSATION AND EFFECTIVE DETERRENCE.

The question of whether the state is a "person" under Section 1983 must be answered so as to effectuate the general purpose of the 42d Congress "to provide compensation to the victims of past abuses . . . [and] to serve as a deterrent against future constitutional deprivations." *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980).[37] Unless this Court holds that states are "persons" under Section 1983, the relief available will be limited in a manner that undermines Section 1983's dual purposes of compensation and deterrence.[38]

A. States must be "persons" under Section 1983 to ensure that compensation for victims of federal rights violations under color of state law is available, adequate, and fair.

Under the Michigan Supreme Court's interpretation of the word "person" in Section 1983, to obtain any

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[37] "It is ancient wisdom that statutes should be interpreted so that the manifested purpose or object can be accomplished." 2A C. Sands, *Sutherland Statutory Construction*, § 58.06, at 723 (4th ed. 1987). *See United States* v. *Zazove*, 334 U.S. 602, 610 (1948).

[38] It is clear from the legislative history that Congress intended to provide broad relief to victims of constitutional deprivations under color of state law. *See supra* at I.A. This does not mean, however, that relief under Section 1983 should be limited to 1871 notions of recovery. Rather, Section 1983 should be interpreted in order to effectuate the broad remedial purpose of the statute. "The section's purpose was to provide redress for the deprivation of civil rights. . . . The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists." *Pierson* v. *Ray*, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting).

recovery for deprivations of federal rights under color of state law a plaintiff must sue an individual defendant in his personal capacity for monetary damages or seek injunctive relief against a state official under the fiction of *Ex parte Young*, 209 U.S. 123 (1908). Neither of these alternatives ensures that the intent of the 42d Congress to provide full compensation is fulfilled.

In the instant case, as in many other Section 1983 cases,[39] monetary damages are necessary to compensate fully a plaintiff.[40] An injunction would have been wholly ineffective in vindicating petitioner's constitutional rights. Michigan's unconstitutional denial of petitioner's promotion occurred in 1973. Petitioner did not learn of the violation of his constitutional rights until 1977, after the law authorizing the "Red Squad" was declared unconstitutional. *See* Pet. Br., Statement of the Case. By that time there was no need to enjoin the state from future unconstitutional activity. The harm had been done, and petitioner was entitled to be compensated for his lost wages, career loss, and emotional distress.[41]

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[39] *See* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 219-227 nn.105-107 (1981) (and cases cited therein).

[40] As this Court has recognized: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Owen*, 445 U.S. at 651.

[41] The trial court agreed and awarded petitioner $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages. *See* Pet. Br., Statement of the Case. The Michigan Supreme Court's decision negated these damages.

1. *Including states as "persons" under Section 1983 ensures that compensation is available.*

Because state officials sued in their personal capacity often may be protected from liability by common law immunities,[42] individual capacity suits will leave many civil rights plaintiffs without any compensation for violations of their federally protected rights resulting from state laws, policies or customs. In the instant case, petitioner's constitutional rights were violated by individuals exercising power pursuant to and required by state law.[43] A court could have found that, prior to 1976 when the law was declared facially unconstitutional, a reasonable person would not have known that the law violated "clearly established" constitutional rights. Thus, if petitioner had sued an individual official in his or her personal capacity, recovery may have been barred by qualified immunity.

By holding that states are "persons" within the meaning of Section 1983, plaintiffs with meritorious claims will be able to recover damages directly from the state when the state's laws, policies or customs violate their federally protected rights. The policies supporting the qualified immunity protection given to individual officials

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[42] *See, e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (executive officials protected from liability for discretionary conduct that does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known"); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) (police officers not liable for actions taken in "good faith and [with] probable cause").

[43] The Michigan state law under which the files of petitioner's brother were kept stated: "The state police *shall* collect information and evidence relating in any manner to activities prohibited by this act." Pet. Br., Statement of the Case (emphasis added). The law further provided: "The commissioner may furnish information contained [in confidential files of information on activities that are subversive of government] to the responsible heads of any agency having charge of employment by the state." *Id.*

have no application in an action against a state that itself has initiated an unconstitutional policy or practice.

In addition to the qualified immunity barrier, a civil rights plaintiff may not be able to secure adequate legal representation to maintain an action against an individual official in the first instance. Attorneys' fees cannot be obtained from the state in a damages action against a state official in his individual capacity, *Kentucky* v. *Graham*, 473 U.S. 159, 167 (1985), and attorneys understandably will be reluctant to initiate litigation against individual officials who may not be able to pay them. Congress, in passing the Civil Rights Attorney's Fees Awards Act of 1976 ("Section 1988"), 42 U.S.C. § 1988 (1976), recognized that many civil rights violations would go without a remedy if attorneys' fees were not available for Section 1983 suits. As Congress explained when it enacted Section 1988:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, the citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News (90 Stat.) 5908, 5910. Thus, the low-income victim of constitutional deprivations under color of state law may have no recourse. This result would clearly be contrary to Congress' intent when it enacted both Section 1983 and Section 1988.

There are other barriers that may prevent recovery against a state official in his personal capacity. For example, the plaintiff may not be able to identify an individual who is amenable to suit for harm caused by a state policy or custom. Often, the problem will be systemic and therefore not attributable to any one individual. *Owen* v. *City of Independence*, 445 U.S. 622, 652 (1980) (" 'systemic' injuries . . . result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.").[44] In some instances, a plaintiff must also establish "a 'pervasive pattern of intimidation' flowing from a deliberate plan by the *named* defendants . . . ." *Rizzo* v. *Goode*, 423 U.S. 362, 375 (1976) (emphasis in original).

Moreover, many civil rights plaintiffs have limited resources and cannot afford the expensive investigations that may be necessary to find an individual defendant. Extensive discovery may be required to identify the individuals who carried out an unconstitutional policy. If the civil rights plaintiff is successful in identifying the individuals responsible, he still may not be able to locate those former state officials who have moved out of the jurisdiction, thus making it difficult to obtain personal jurisdiction over them.

2. *Including states as "persons" under Section 1983 ensures that the compensation is adequate.*

Even assuming that the aforementioned barriers do not preclude the civil rights plaintiff from proceeding to court with a meritorious claim, he faces additional barriers to full recovery in court if the state is not subject to suit under Section 1983. One such barrier occurs at trial when the plaintiff must ask a jury to award monetary damages against a state official. Juries often will be unwilling to assess full compensatory damages against "hard-working, underpaid" low level officials who will

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[44] *See, e.g., Howell* v. *Cataldi*, 464 F.2d 272, 282-284 (3d Cir. 1972) (directed verdict in favor of defendant police officers where plaintiff could not specifically identify the police officers who had beaten him); *see also* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 224 (1981) ("plaintiff may have trouble even identifying the wrongdoer, though it is clear that the wrongdoer must be an officer of the state.").

have to pay the judgment out of their own pockets.[45] Even if the state provides indemnification, the juries in many states may not be told that the state will pay for any judgment against the official. *See, e.g.*, Idaho Code, § 6-903(f). Thus, the victim may not receive compensatory damages adequate to remedy his injuries.

Assuming that the jury does award an adequate remedy in a personal capacity action, the state official defendant nevertheless may not have sufficient resources to satisfy the judgment. This is often true when the defendant is a government employee with limited resources and the deprivation of rights is attributable to an unconstitutional policy or custom. As in the instant case, a systemic policy or custom will often harm many people before it is declared unconstitutional. State employees, subject to suit in their individual capacity for enforcing the unconstitutional policy, are likely to have limited resources. One successful claim could bankrupt the employee and preclude recovery for subsequent plaintiffs.

Even state indemnification statutes providing indemnification of state officials for claims brought against them in their individual capacities will not afford relief in many cases.[46] Many state indemnification statutes do not require indemnification but merely "authorize" or give discretion to the governor or other official to decide whether to indemnify. *See, e.g.*, Ind. Code Ann. § 34-4-

[45] *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L. J. 447, 456 (1978); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 224 (1981).

[46] In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), Justice Powell "assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority." 436 U.S. at 713 n.9. However, the availability of indemnification of state officials is not certain. *See* P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, 227 n.1 (1983).

16.7-1 (1976); Me. Rev. Stat. Ann. tit. 14, § 8112 (1980); S.C. Code Ann. § 1-11-140 (Law. Co-op. 1986). Some statutes only cover state tort claims. *See, e.g.*, Iowa Code Ann. § 25A.21 (West Supp. 1988). Often, the amount of indemnity available is limited and will thus not provide full compensation. *See, e.g.*, R.I. Gen. Laws § 9-31-12 (1985) ($50,000); S.D. Codified Laws Ann. §§ 3-19-1, 3-19-2 (1985) ($25,000); Vt. Stat. Ann. tit. 3, § 1103 (1985) ($100,000).

In addition, states can restrict or even abolish their indemnification provisions at any time, leaving the prospect of recovery uncertain for many plaintiffs under Section 1983. Congress must have intended that Section 1983 provide a uniform and complete system of compensation for victims of state misconduct. Leaving the amount of a Section 1983 plaintiff's recovery to the whim of the state will undermine this congressional intent. If the state is not a "person," the plaintiff thus may be without a complete remedy. Although a plaintiff would be subject to similar barriers when the deprivation of his constitutional rights is not attributable to a state policy or custom, the recovery should not be so limited when it is the state that is responsible. *See Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978); *Owen*, 445 U.S. at 651.

3. *Including states as "persons" under Section 1983 ensures that the system of compensation is fair.*

Congress surely intended that the broad remedy under Section 1983 for compensating citizens deprived of their constitutional rights be fair. When a state passes a law or establishes a policy which violates rights guaranteed by the Constitution, justice demands that it be the state that bears the responsibility for compensating the person deprived of those rights. *See Owen*, 445 U.S. at 654 ("Elemental notions of fairness dictate that one who causes a loss should bear the loss."). If the state cannot

be sued for these wrongs, the person whose rights were violated may seek redress only from the state official who carried out the state's commands.[47] But when it is the state's policy or custom and not the state official's independent action that violates the individual's rights, it is unfair to place the burden of compensation on the state official. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

There is no unfairness, however, in requiring the state to compensate citizens for violations of their federal rights. A government entity has no " 'discretion' to violate . . . the Federal Constitution; its dictates are absolute and imperative." *Owen*, 445 U.S. at 649 (referring to municipalities). One of these dictates is the Fourteenth Amendment which imposes "absolute" and "imperative" obligations upon the states.[48] "[W]hen execution of a government's policy or custom . . . inflicts the injury the government as an entity is responsible under § 1983." *Id.*

Holding that the state is not a "person" under Section 1983 would place the costs of the state's unconstitutional policies on the shoulders of the victims or the less culpable state officials instead of on the state where it properly belongs. Congress could not have intended such an unjust result when it enacted Section 1983. Justice Powell implicitly recognized this unfairness in *Monell* when he wrote: "It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be exclusively liable for resulting constitutional injury." *Monell*, 436 U.S. at 707 (Powell, J., concurring).

A holding that states, like municipalities, are "persons" under Section 1983 also is required to ensure fair

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[47] *See* discussion of limitations of this remedy at II.A.1 and II.A.2. *supra*.

[48] *See, e.g.*, U.S. Const. amend. XIV, § 1 ("No *State* shall . . . .") (emphasis added).

and evenhanded treatment of persons injured by the misconduct of government actions at the state and local levels. The 42d Congress would not have intended that petitioner's recovery depend on whether it was a state law or a city ordinance that denied him his rights. Surely Congress would not have intended that petitioner be allowed recovery only if he had been "fortunate enough" to have been denied his promotion by the Detroit city police department, on the basis of a similar "Red Squad" municipal statute, instead of by the Michigan Department of State Police. Congress would have intended that a remedy be available in either case.

B. States must be "persons" under Section 1983 to ensure efficient deterrence of federal rights violations.

This Court consistently has recognized that Congress intended Section 1983 "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen*, 445 U.S. at 651; *see also Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978). Placing the deterrent pressure of monetary damages directly on the states is the most logical and efficient means of discouraging state violations of federal rights and encouraging state vigilance in rooting out federal rights violations among its agencies and officials.

It has long been recognized that the threat of monetary damages is an effective deterrent. Restatement of Torts § 944(2) (1939) ("the punishment inherent in the [damages] remedy will have a . . . deterrent effect upon the defendant."). When a plaintiff must seek monetary relief against an individual for the state's unconstitutional laws, policies, and customs, and any one of the many barriers discussed *supra* limit or bar recovery, the state is likewise not deterred. This Court has recognized that "the threat that damages might be levied against the

city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Owen*, 445 U.S. at 652. This rationale applies with equal force to the states.

Although some states provide indemnification for state officials sued in their personal capacity, a damage award against the state official rarely will provide the deterrence that Congress intended. Most state statutes do not allow indemnification if the official's conduct or lack thereof was not in good faith. *See, e.g.*, Del. Code Ann. tit. 10, § 4002 (1984) (no indemnification if not in good faith, not wanton or grossly negligent); Ill. Ann. Stat. ch. 127, ¶ 1302(e) (Smith-Hurd 1987) (no indemnification if conduct was "intentional, wilful, or wanton"); Ohio Rev. Code Ann. § 9.87 (Page 1985) (no indemnification if official acted with malicious purpose, in bad faith, or in a wanton or reckless manner). Under the qualified immunity doctrine, if the state official does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), or acts in good faith with a reasonable basis, *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), he will be immune. In most instances where the indemnification statute would cover the official's conduct, the qualified immunity doctrine will bar liability anyway and the state will not have to pay damages. Additionally, the state will not even be required to pay for the defense of the state official because the issue of immunity must be resolved before discovery will be allowed. *Harlow*, 457 U.S. at 818. Thus, states rarely will be deterred by personal capacity suits against their officials.

If the civil rights plaintiff chooses the other option available under the lower court's reading of Section 1983, an injunction against a state official in federal court under *Ex parte Young*, 209 U.S. 123 (1908), the deterrent effect on the state will be prospective only.

Without the potential threat of a damage award against the state, there will be little incentive for the state to identify and avoid unconstitutional governmental laws, policies, and customs before individuals are deprived of their constitutional rights.

With less care taken on the part of the state, many more violations will occur and more plaintiffs will be forced to seek redress from the courts. In addition, individuals forced to seek injunctions must go to court to obtain them and ensure that they are enforced. The threat of a monetary damage award against the state may prevent the violation before it occurs and reduce the need to run to the courthouse for relief. Congress surely intended that Section 1983 deter constitutional violations efficiently. Making states accountable "persons" under Section 1983 is the most efficient method possible.

CONCLUSION

This Court should hold that states are "persons" within the meaning of Section 1983 for "[t]o take away all remedy for the enforcement of a right is to take away the right itself." *Poindexter* v. *Greenhow*, 114 U.S. 270, 303 (1885). Accordingly, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF *AMICI* ORGANIZATIONS

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. The Lawyers' Committee has dedicated its resources to securing private counsel for victims of race discrimination and to securing for all persons equal justice under the law. To this end, the Lawyers' Committee has participated in numerous cases in this Court urging that Section 1983 be construed to provide redress to civil rights litigants.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal object is to secure, through litigation and education, the civil rights of Hispanics living in the United States. MALDEF's position, as stated herein, has developed through extensive litigation under the Fourteenth Amendment and 42 U.S.C. § 1983.

The National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality as well as social and economic justice in this country. To promote those ends, the NAACP and its members often initiate litigation in both federal and state courts to enforce federal constitutional and statutory rights. The NAACP's ability to name states as defendants in state court actions and to seek appropriate relief from states where their policies have infringed on federal rights is important both to permitting effective litigation and to achieving our broader purpose of deterring unlawful state conduct.

The Michigan Trial Lawyers Association comprises lawyers representing injured persons. The Association is dedicated to advancing the science of jurisprudence and promoting the administration of justice for the pub-

lic good. Association members currently represent persons injured as a result of state action on the part of police and other agents of the State of Michigan. It is because of this interest that the Michigan Trial Lawyers Association, through its *Amicus Curiae* Committee, supports the position of the Petitioner herein.

Michigan Legal Services is interested in the outcome of this case because it represents many impoverished individuals who require redress from state governmental agencies and who may be denied access to the courts by the holding of the court below. Michigan Legal Services is currently and has been counsel to persons whose homes have been subject to foreclosure when the state welfare agency involuntarily vendored their mortgage payment and also to persons wrongfully denied payment for medical procedures by the same state agency. These clients' efforts to obtain fair compensation for their injuries and even prospective relief will be impeded unless the decision below is reversed.

The Center for Constitutional Rights was born of the civil rights movement and the struggle of black people in the United States for true equality. Center for Constitutional Rights attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing, and employment discrimination. Through litigation and public education we have worked to protect and make meaningful the constitutional and statutory rights of women, blacks, Puerto Ricans, native Americans, and Chicanos.